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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 19, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(34,995)

(34,995)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 824

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS,

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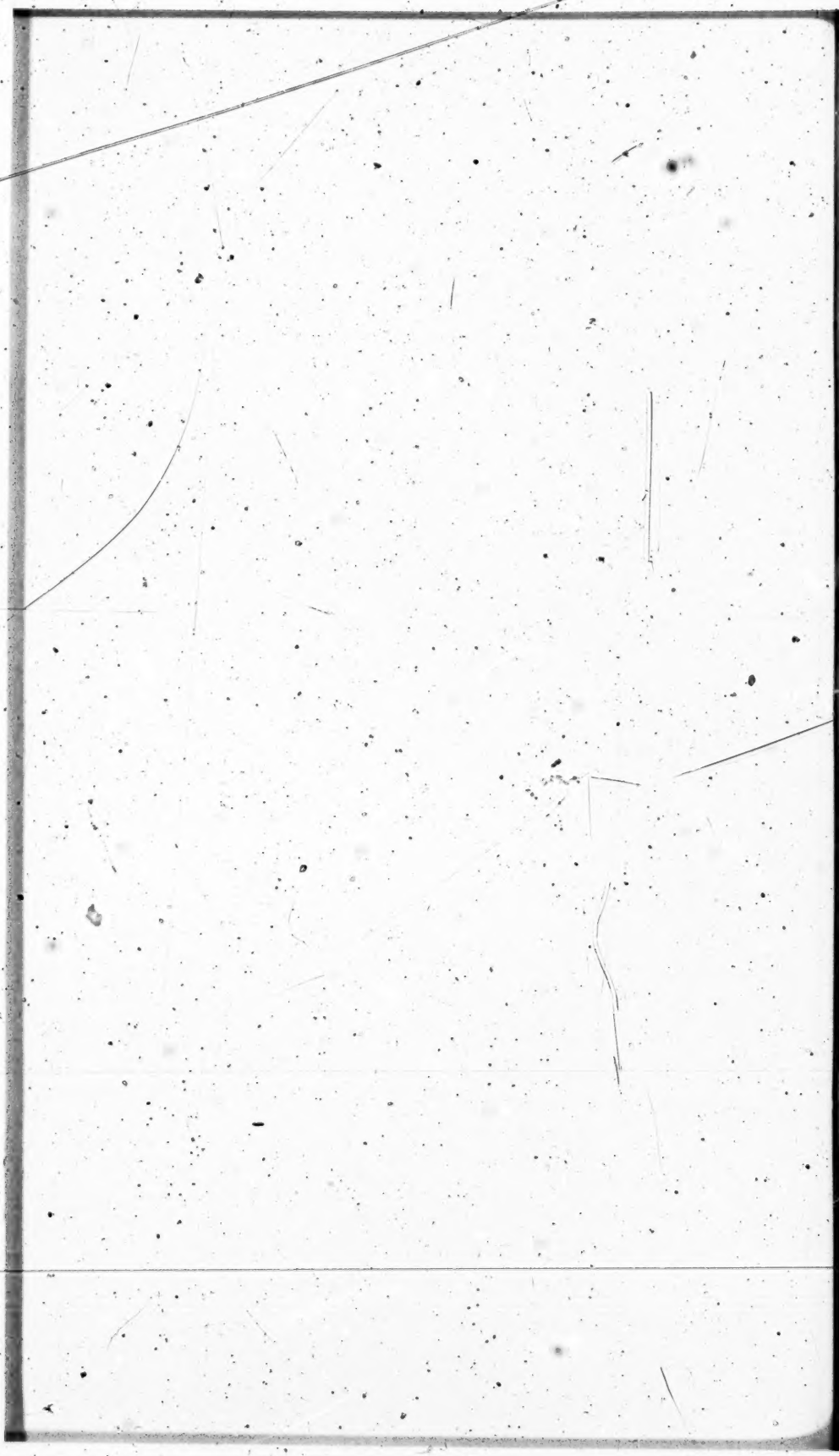
ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	6
Petition	1	6
Exhibit "A"—Claim for refund	10	11
Exhibit "B"—Letter from Commissioner rejecting claim	13	13
General traverse	15	14
Argument and submission	15	14
Special findings of fact	16	14
Conclusion of law	17	16
Opinion, Green, J.	17	16
Concurring opinion, Graham, J.	21	22
Judgment	26	29
Clerk's certificate (omitted in printing)	27	
Order allowing certiorari		31



[fol. 1] IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 824.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. Hatch, as Executors of the Estate of Seth M. Milliken, Deceased, Petitioners,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable Supreme Court of the United States:

Your petitioners above named, Seth M. Milliken, Gerrish H. Milliken and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, deceased; by their attorney respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims entered in the above entitled cause on February 17th, 1930.

Question Involved

The question involved in this case is whether the provisions of Section 402(c) of the Revenue Act of 1918 (40 Stat. 1057-1152) are in violation of the provisions of the [fol. 2] Constitution of the United States and amendments thereto in so far as they purport to include as a part of the net estate of a decedent dying subsequent to the passage of that Act the property transferred by such decedent by way of gift made in contemplation of death prior to the passage of such Act, to value such property for the purpose of the tax at its value at the time of the death of such decedent, irrespective of its value at the time decedent completely and irrevocably divested himself of title thereto prior to the passage of the Act and to tax the same at the rates provided by such Act, such rates being materially in excess of those provided by the Act in effect at the time of the gift.

Statutes Involved

Following are the pertinent sections of the Revenue Act of 1916 in effect at the time the gift in question was made and of the Revenue Act of 1918 in effect at the time of decedent's death. For greater convenience of reference, the provisions of the two Acts are set forth in parallel columns.

1916 Act

(39 Stat. 777-778)

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be [fol. 3] determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax. See "Note".)

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take

1918 Act

(40 Stat. 1096-1097)

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginning at 1% on the amount of the net estate not in excess of $50,000 and running up to 25% of the amount in excess of $10,000,000.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(NOTE.—The rates imposed by the Act of Sep- [fol. 4] tember 8, 1916, were from 1% on the amount of the net estate not in excess of $50,000 up to 10% of the amount in excess of $5,000,000. By Section 300 of the Act of March 3, 1917 (39 Stat. 1002), this section was amended so as to provide rates from 1½% of the amount not in excess of $50,000 up to 15% of the amount in excess of $5,000,000. By Section 900 of the Act of October 3, 1917 (40 Stat. 324), an additional tax was imposed beginning at ½ of 1% on the amount of the net estate not in excess of $50,000 and running up to 10% of the amount in excess of $10,000,000.)

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Facts

The facts as stipulated by the parties before the Court of Claims of the United States and as found by said Court of Claims may be briefly summarized as follows:

Seth M. Milliken died March 5th, 1920. In December, 1916, over three years prior to his death, he had transferred by way of gift 2,713 shares of the capital stock of Minot Mills, Inc., 1,000 shares to his son Gerrish H. Milliken, 1,000 shares to his son Seth M. Milliken, and 713 shares to his daughter Margaret M. Hatch.

The petitioners in this action have waived any right to assert that such gift did not constitute a transfer in contemplation of death. Subsequent to decedent's death, peti- [fol. 5] tioners as executors of decedent's estate filed a return and supplemental return for the federal estate tax and paid the tax as shown thereunder. Such returns showed the fact of the gift in question but did not include it as part of the estate subject to tax. Later, and on or about August 5th, 1924, the Commissioner redetermined the tax due from the petitioners and included as a part of the estate subject to tax the same 2,713 shares of stock, determined the value of said shares at the time of decedent's death at the sum of $3,308,720.54 and assessed an additional estate tax in the sum of $830,917.24, of which amount the sum of $812,165.42 resulted from the inclusion of said shares of stock as a part of the taxable estate. Said additional tax was duly paid by petitioners pursuant to notice and demand therefor and thereafter, in due time and in proper manner, petitioners filed with the Commissioner of Internal Revenue a claim for the refund of said sum of $812,165.42, representing the amount assessed and paid with respect to said 2,713 shares of capital stock, alleging that such stock transfer as aforesaid did not constitute a part of decedent's estate at the time of his death and that the provisions of Section 402(c) of the Revenue Act of 1918 in so far as they purport to apply to the property in question are in violation of the Constitution of the United States and amendments thereto. Said claim was rejected by the Commissioner of Internal Revenue and in due time and proper manner suit for the refund of said sum of $812,- [fol. 6] 165.42 was begun in the Court of Claims.

Assignments of Error

I. The Court of Claims erred in holding that the provisions of Section 402(c) of the Revenue Act of 1918 purporting to include in the net estate of a decedent dying subsequent to the passage of that Act property transferred by him in contemplation of death several years prior to the passage of the Act, to value such property for the purpose of the tax at its value at the time of decedent's death, and to tax it at the rates provided by said Act, were not arbitrary and capricious and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

II. The Court of Claims erred in holding that the said provisions of Section 402(c) of the Revenue Act of 1918 were not in violation of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution in that they seek to impose a direct tax not apportioned in accordance with any census or enumeration.

III. The Court of Claims erred in entering judgment in favor of the United States.

[fol. 7] Reasons for Granting the Writ

I. The Court of Claims has decided an important issue respecting the constitutionality of a federal law which would be settled by this Court but thus far has not been directly passed upon by this Court.

II. One of the reasons assigned in the concurring opinion of Judge Graham for rendering judgment in favor of the United States was that "It has been the policy of this Court [i.e. the Court of Claims] not to adjudge an act of Congress unconstitutional." Both this opinion and the opinion of Judge Green clearly imply that the question at issue should be and presumably would be finally passed upon by this Court.

III. The decision of the Court of Claims will affect numerous other cases arising both under the 1918 Act and under subsequent Acts. The amount involved in the instant case, including interest, is upward of $1,000,000 and while the amount involved in other similar cases to which the decision in question will be applicable cannot be defi-

nitely indicated, it will undoubtedly run into many millions of dollars.

IV. The decision of the Court of Claims is contrary to the principle enunciated in numerous decisions of the United States Board of Tax Appeals arising under the 1918 and subsequent Revenue Acts and unless the issue involved [fol. 8] be definitely settled by this Court the conflict of rulings of the two bodies of similar jurisdiction will result in great confusion.

V. The decision of the Court of Claims cannot be reconciled with the principles enunciated and rules laid down by this Court in several cases involving somewhat analogous although not identical questions.

VI. The decision of the Court of Claims is to the effect that there is no constitutional limitation upon the authority of Congress to tax retroactively a gift made in contemplation of death at whatsoever rate it may see fit to impose and to value the property for the purpose of fixing the tax at a sum which bears no relation whatsoever to any value which the subject-matter of the gift may actually have had at the time when the donor completely divested himself of all interest and title in and to the property or at any other time while it was in his possession and under his control.

For these reasons, it is respectfully submitted that a Writ of Certiorari to review the judgment of the Court of Claims should be issued.

D. A. Embury, Attorney for Petitioners.

[fol. 1] In Court of Claims of the United States

J-337

Seth M. Milliken, Gerrish H. Milliken, and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, Deceased,

vs.

The United States of America

1. Petition—Filed June 4, 1928

To the Court of Claims of the United States and to the Honorable the Judges thereof:

The above named claimants, by this their petition, respectfully show as follows:

I

On March 5, 1920, Seth M. Milliken died a citizen of the United States and a resident of the Borough of Manhattan, City, County and State of New York, leaving a last Will and Testament wherein and whereby claimants were appointed executors. On or about March 20, 1920, said last Will and Testament was duly admitted to probate by the Surrogate of said County and State of New York, and letters testamentary thereon were duly issued and granted to claimants as executors on or about March 23, 1920. Claimants there-[fol. 2] upon duly qualified as executors and ever since have been and now are acting as such—all of which more fully appears by the duly authenticated copy of the record of claimants' appointment as executors filed herewith.

II

On or about March 4, 1921, within the time limited by law and the regulations in such case made and provided, the claimants duly filed with the Collector of Internal Revenue for the Second District of New York, a return for federal estate tax for the Estate of said Seth M. Milliken, deceased, and on or about August 31, 1921, the claimants filed with the said Collector a supplemental return. At the time of filing said supplemental return on August 31, 1921, the claimants paid or caused to be paid to the said Collector the sum of $1,552,653.88, being the total amount of tax shown by both of said returns.

III

Thereafter, on or about February 5, 1926, within the time limited by law as extended by waivers filed by claimants, the Commissioner of Internal Revenue determined and assessed against claimants as executors of the Estate of said Seth M. Milliken, deceased, an additional federal estate tax of $830,917.24, of which amount $812,165.42 resulted from the inclusion in the gross estate of the value of 2,713 shares of capital stock of Minot Mills, Inc., a Delaware corporation, transferred, set over and assigned in December, 1916, by the decedent to his two sons and his daughter.

[fol. 3]

IV

On March 10, 1926, pursuant to notice and demand made by the Collector of Internal Revenue for the Second District of New York and in order to avoid the imposition of interest and penalties threatened, the claimants paid the said additional tax of $830,917.24, said payment being made under protest with respect to $812,165.42 thereof.

V

On March 12, 1926, within the time and in the manner prescribed by law and the Regulations in such case made and provided, the claimants duly filed with the Commissioner of Internal Revenue through the office of the Collector of Internal Revenue for the Second District of New York, a claim for the refund of said $812,165.42, a true copy of which refund claim is hereto annexed, made a part hereof and marked Exhibit A.

VI

By letter dated June 25, 1926, a true copy of which is hereto annexed, made a part hereof and marked Exhibit B, the Commissioner of Internal Revenue rejected the said claim for refund in its entirety.

VII

Section 402 of the Revenue Act of 1918, which was the law in force at the time of the death of said Seth M. Milliken, provides in part, as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the [fol. 4] time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment

at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;".

VIII

That the provisions of the Revenue Act of 1918 and, specifically, of Section 402(c) thereof, in so far as they purport to be retroactive and to tax the said transfers made in December, 1916, and before the enactment of said Act, are arbitrary, confiscatory, invalid and in violation of the Constitution of the United States and of the provisions of Article One thereof and of the Fifth Amendment thereto, and that therefore the said assessment and collection of said additional estate tax to the extent of $812,165.42 were erroneous, wrongful and illegal and in violation of claimants' constitutional rights.

[fol. 5]

IX

Claimants have complied with all acts of Congress and Regulations of the Secretary of the Treasury and of the Commissioner of Internal Revenue pertaining to the filing of estate tax returns and claims for refund and for the recovery of Internal Revenue taxes alleged to have been erroneously and illegally assessed or collected or to be excessive or in any manner to have been wrongfully collected; a claim for refund was duly filed with the Commissioner of Internal Revenue as hereinbefore set forth; more than six months have elapsed since the filing of said claim for refund and the Commissioner of Internal Revenue has rendered a decision thereon rejecting said claim for refund in its entirety. Five years have not elapsed since the payment of said additional tax of $830,917.24 as hereinbefore set forth; nor have two years elapsed since the disallowance of said claim for refund by the Commissioner of Internal Revenue as aforesaid.

X

Claimants represent that they (and the said Seth M. Milliken, deceased) have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against such Government; and have not aided or abetted or given comfort to any sovereign or government that has been at war with such Government; that as executors of the Estate of Seth M. Milliken, the claimants are the sole and absolute owners of the claim herewith presented; that no transfer or assignment of said claim or of any part thereof has been made; that no other action than as aforesaid has been taken on this claim in Congress or in [fol. 6] or by any of the Departments or in any court other than this proceeding in this Court and that as executors of the said Estate the claimants are justly entitled to the amount claimed herein from the United States after allowing all just credits and offsets.

XI

Claimants believe the facts as stated in this petition to be true, and file this petition to recover from the United States the sum of $812,165.42 paid to the Collector of Internal Revenue of the Second District of New York and turned over by him to the United States in the usual course of his business, the whole of said sum at this time being retained and held by the United States, together with interest thereon from the date of payment.

Wherefore claimants pray judgment against the United States of America upon the facts and law for the sum of $812,165.42, with interest thereon from March 10, 1926.

Respectfully submitted.

Seth M. Milliken, Gerrish H. Milliken, Harold A. Hatch, Executors of the Estate of Seth M. Milliken, Deceased. D. A. Embury, 30 Broad Street, Borough of Manhattan, City of New York, Attorney of Record. Curtis, Mallet-Prevost, Colt & Mosle, of Counsel.

[fols. 7-9] Duly sworn to by Seth M. Milliken et al. Jurats omitted in printing.

[fol.10] EXHIBIT A TO PETITION

Form 843—Jan., 1922—Comptroller General U. S.—January 18, 1922

(Execute Separate Form for Each Tax Period).

Treasury Department, Internal Revenue Service

Claim for

( ) Abatement of Tax Assessed

( ) Credit Against Outstanding Assessments

(x) Refund of Taxes Illegally Collected

( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation: District, ——; Account number, ——; Date received: ——; Stamp here. —— ——, Collector of Internal Revenue.

Date received by Administrative Unit: Stamp here: ——.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases

State of New York, County of New York, ss:

Type or Print: (Name of taxpayer or purchaser of stamps.) Gerrish H. Milliken, Seth M. Milliken, and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, (Residence—Give street and number as well as city or town and State.) 79 Leonard Street, New York City (Business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the

taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From:	19
To:	19

1. Business in which engaged: ——.

2. Character of assessment or tax: Estate tax. (State for or upon what the tax was asessed or the stamps affixed.) [fol. 11] 3. Amount of assessment or stamps purchased: $2,383,557.51.

4. Reduction of Tax Liability requested (Income and Profits Tax): $812,165.42.

5. Amount to be abated: None.

6. Amount to be refunded (or such greater amount as is legally refundable): $812,165.42.

7. Dates of payment (see Collector's receipts or indorsements of cancelled checks): 8/31/21. 1,552,640.27.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.) 3/10/26 830,917.24.

8. District in which return (if any) was filed: Second District, N. Y.

9. District in which unpaid assessment appears: None.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from —— to ——: None.

Deponent verily believes that this application should be allowed for the following reasons:

The sum of $812,165.42 covered by the present claim for refund represents estate tax purported to be assessed under the Revenue Act of 1918 in respect to 2713 of the shares of Minot Mills, Inc. (valued as of decedent's death at $3,308,720.54) which had been transferred by the decedent Seth M. Milliken in December, 1916, as follows:

To his son Gerrish H. Milliken	1,000 shares
" " " Seth M. Milliken	1,000 "
" " daughter Margaret M. Hatch.	713 "

The said shares were so transferred by the decedent more than three years before his death and more than two years before the passage of the Revenue Act of 1918. The

assessment of estate tax in respect thereof was illegal, invalid and unauthorized because the said shares were not part of the decedent's estate at the time of his death and because the provisions of the Revenue Act of 1918 in so far as they purport to tax such transfers made before the [fol. 12] passage of said Act are in violation of the Constitution of the United States and the amendments thereof.

(Attach additional sheets if necessary.)

(Signed) Seth M. Milliken, Gerrish H. Milliken, Harold A. Hatch, Executors of the Estate of Seth M. Milliken.

Sworn to and subscribed before me this 12 day of March, 1926. R. B. Horton, Ralph B. Horton, (Title.) Notary Public, Richmond County. (Notarial Seal.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 13] EXHIBIT B TO PETITION

[SEAL.]

Treasury Department, Washington, Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1-R-1865-RKS.

District of 2d New York.

Estate of Seth M. Milliken.

Date of death: March 5, 1920.

Jun. 25, 1926.

Gerrish H. Milliken et al., executors estate of Seth M. Milliken, 79 Leonard Street, New York, New York.

SIRS: The Bureau has examined the claim, filed by you as executors of the above named estate, for refund of $812,165.42 of the Federal estate tax paid under the provisions of the Revenue Act of 1918.

The claim is based upon the contention that the assessment and collection of the estate tax in respect of transfers

made by the decedent prior to the passage of the Revenue Act of 1918, was unlawful and illegal because the provisions of the Revenue Act of 1918, in so far as they purport to tax transfers made before the passage of said Act, are in violation of the Constitution of the United States.

[fol. 14] It is the duty of the Internal Revenue Bureau as a part of the administrative branch of the Government, to administer the laws as passed by Congress.

In view of the foregoing, your claim for refund of $812.165.42 is rejected in its entirety.

Respectfully, D. H. Blair, Commissioner.

aho.

[fol. 15] II. General Traverse—Filed July 14, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

F. K. D.

III. Argument and Submission of Case

On December 10, 1929, this case was argued and submitted on merits by Mr. David A. Embury, for the plaintiffs, and by Mr. Fred K. Dyar, for the defendant.

[fol. 16] IV. **Special Findings of Fact, Conclusion of Law, Opinion of the Court by Green, J., and Concurring Opinion by Graham, J.**

Mr. D. A. Embury for plaintiffs. Curtis, Mallet-Prevost, Colt & Mosle were on the briefs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Messrs. William E. Davis and William T. Sabine were on the brief.

This cause having been heard by the Court of Claims, the court, pursuant to and in accordance with the stipulation of the parties filed herein, makes the following

Special Findings of Fact

1. On March 5, 1920, Seth M. Milliken died, and in the latter part of March of the same year plaintiffs were duly appointed executors of his estate and qualified as such.

2. In 1921 plaintiffs filed a return and supplemental return for Federal estate tax to be paid by said estate, and paid the tax due according to such returns. These returns did not include in the property of decedent subject to tax 2,713 shares of the capital stock of Minot Mills (Inc.); the taxability of which is at issue in this case, but did show that in December, 1916, this stock had been transferred by way of gift by decedent—1,000 shares to his son, Gerrish H. Milliken, 1,000 shares to his son, Dr. Seth M. Milliken, and 713 shares to his daughter, Margaret M. Hatch. This stock was so transferred in December, 1916, and plaintiffs have waived any right to assert that the transfer of said 2,713 shares of capital stock of Minot Mills (Inc.), made as aforesaid, was not as a matter of fact a transfer by the decedent in contemplation of death.

3. Afterwards and on August 5, 1924, the commissioner made a redetermination of the tax due from plaintiffs, and about February 5, 1926, within the time limited by law as extended by waivers theretofore filed by plaintiffs, assessed against plaintiffs, as executors of the estate of said Seth M. Milliken, deceased, an additional Federal estate tax of $830,917.24, of which amount the sum of $812,165.42 re[fol. 17] sulted from the inclusion in the gross estate of the said 2,713 shares of capital stock of Minot Mills (Inc.), valued by the Commissioner of Internal Revenue for the purpose of the Federal estate tax at their value at the time of decedent's death in the sum of $3,308,720.52, and included in such gross estate and tax, pursuant to the provisions of section 402 (c) of the revenue act of 1918, as a gift made by decedent in contemplation of death.

About March 10, 1926, pursuant to notice and demand made by the collector of internal revenue, plaintiffs paid the said $830,917.24. Thereafter, in due time and in proper

manner, the plaintiffs filed with the Commissioner of Internal Revenue a claim for the refund of $812,165.42, representing the amount of the Federal estate tax assessed and paid with respect to the said 2,713 shares of capital stock of Minot Mills (Inc.), as aforesaid, which claim was rejected by the commissioner.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This is a suit to recover $812,165.42 alleged to have been wrongfully collected as additional estate taxes. Plaintiffs filed a claim for refund thereof which was denied by the commissioner.

The facts in the case are not in dispute.

The plaintiffs are executors of the estate of Seth M. Milliken, who died on March 5, 1920. In December, 1916, the testator transferred by way of gift 2,713 shares of capital stock of Minot Mills (Inc.). After the death of the decedent the plaintiffs filed a return for the purposes of the tax upon his estate. In so doing they failed to include the 2,713 shares of stock above referred to. The commissioner held that this stock had been transferred in contemplation of death and that the value thereof should have been included as a part of the gross estate. For the purpose of the Federal estate tax he fixed the value thereof at the time of the decedent's death in the sum of $3,308,720.54. By reason of this action an additional tax of $812,165.42 was assessed against the estate of the decedent. The plaintiffs paid this additional tax and their application for refund thereof having been denied, now bring this suit,

but do not contend that the stock involved was not transferred in contemplation of death.

The issue in the case is whether the commissioner correctly included the shares of stock above referred to in the gross estate.

The decedent died in March, 1920, and the commissioner applied the provisions of the revenue act of 1918 in determining the tax against his estate, the 1916 act being then repealed. The transfer was by way of gift, and section [fol. 18] 402 of the revenue act of 1918 directs that the gross estate of the decedent shall be ascertained by including (among other things) the value at his death of all property—

"To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth."

This language is so plain and definite that it is clear that this section applies to the transfer under consideration in this case, although it was made prior to the passage of the 1918 act. Plaintiffs do not question this construction of the statute, but contend that when applied to gifts made prior to the time when the revenue act of 1918 went into force, the statute is unconstitutional. This constitutes the question to be determined in the case.

Nichols v. Coolidge, 274 U. S. 531, is cited as supporting the contention of the plaintiffs. In that case it appeared that the decedent and her husband had in July, 1907, transferred certain property without consideration to trustees who agreed to hold it and pay the income to the settlors, then to the survivor, and thereafter to dispose of it in a manner not necessary here to repeat. On April 6, 1917, the settlors assigned to their children their entire interest in the property. In May, 1917, the decedent and her husband conveyed absolutely certain other property to their children, but we are here concerned only with the application of the law made by the Supreme Court to the transfer

first above set forth. The death of the decedent occurred in January, 1921. Her executors made a return under the revenue act of 1918 (approved February 24, 1919) which did not include the property first transferred. The commissioner held that under the provisions of section 402 (c) of said act, which are above set forth, the value of all this property at her death must be included in the gross estate.

The Supreme Court found that the transfer was not made in contemplation of death and held that section 402 (c)—

"* * * in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confication";

and in giving its reasons for holding the statute arbitrary said:

"An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must [fol.19] bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See Frew v. Bowers, 12 Fed. (2d) 625."

One fact which is recited above is not found in the case at bar. In the Coolidge case, supra, the transactions are said to be "not testamentary in character," by which we understand the court to mean that they were not made in contemplation of death as a part of a plan of distributing the estate of the grantor by conveyance instead of by will. In fact the court in another part of the opinion, states expressly that the transfers were not made in contemplation of death. It is true that the court said in this connection that "undoubtedly, Congress may require that property subse-

quently transferred in contemplation of death be treated as part of the estate for purposes of taxation." Counsel for plaintiffs argue that it is a fair inference from this language that conveyances made prior to the taxing statute under such circumstances would not be subject to taxation, but we think that what the court intended to have understood was that there was no doubt about such transfers being subject to the tax when made after the enactment of the statute, but as to those made prior thereto it was an open question when they were made in contemplation of death.

As the transfer under consideration in the case at bar was made in contemplation of death, it become necessary to determine this question.

If we consider only cases where the statute is not retroactive, we find in the language hereinabove quoted from the Coolidge case that "undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation." If this be true, it is quite clear that such a statute is not arbitrary and capricious and cannot be held unconstitutional on that ground, although on first consideration it might appear that some of the language used in the Coolidge case and in other cases might apply thereto as a reason for holding it invalid. But when we apply the statute to transfers made in contemplation of death, the whole aspect of the case is changed, and the reasons which the court gave for holding the conveyances in the Coolidge case not subject to tax do not apply in the case at bar.

In the instant case, the maker of the transfer, as in practically all cases where a conveyance is made in contemplation of death, was using the conveyance to dispose of or distribute his property instead of a will. His purpose was to make this disposition before death intervened to terminate his control thereof. In its effect it differed but little from disposition by will. If another owner of property disposed of all his property by will, the law required from his estate a tax based on the value thereof. What reason can be given why the estate of the man who transfers a part of his property in contemplation of death should not pay the same tax as the one who transfers it by will? None, we think, but on the contrary it appears that a provision for taxing property so conveyed in contemplation of death as part of

the estate is reasonable and just, and makes for equality between taxpayers rather than inequality, which would otherwise exist. If these conclusions are correctly drawn, it is clear that such a tax is not arbitrary or capricious. [fol. 20] Another forcible and distinct reason for holding such a tax valid is, as stated in the Coolidge case, that it is necessary to prevent evasion. It is perfectly evident that if the owner of an estate, after he had reason to believe that death was nigh, could in contemplation thereof distribute his property by gift instead of by will, the means of avoiding the estate tax would be so apparent and easy, avoidance would become the rule and the payment of the tax the exception. Moreover, in such event, those who were interested in estates conveyed by will could justly complain of the unfair and unjust situation in which they were placed as compared to those who were purposely avoiding the estate tax. It is well settled that when the general purpose of a legislative act is within the admitted power of the Government that the legislative body, as said in Purity Extract Co. v. Lynch, 226 U. S. 192, 201, "may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective"; and further in the same case: "It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." This is especially true where the purpose of the act is in part to prevent evasion, and while so far only transactions occurring after the passage of the act have been discussed, it ought also to be said in this connection that the provision in the statute which made it apply to prior transactions was undoubtedly intended to prevent evasion by making conveyances before the act could go into force. Such provisions have been held valid in tariff acts.

It may be thought at first that it is not necessary to elaborate these reasons for holding that the tax on gifts made in contemplation of death is not arbitrary when the Supreme Court has already held that the tax is constitutional when applied to transactions prior to the enactment of the law which imposed it, but these matters are here discussed because they show that the grounds for holding such a tax

not to be arbitrary are exactly the same whether the statute is applied to a transfer made after its enactment or before it went into effect, and vice versa no reason can be given for holding the statute to be arbitrary when applied to transactions that took place before its enactment that would not apply equally well to those which occurred after it went into force.

It is urged on behalf of plaintiffs that the retroactive features of the act violate the due process clause of the fifth amendment, and that the act further violates the due process clause of the same amendment by the manner in which the gross estate is computed; also that the act, in so far as it applies to property not owned by the decedent at the time of his death but transferred by way of gift prior thereto, imposes a direct tax which is void for want of apportionment. These statements are general and the matters which form the principal basis for the attack on the act may be more specifically stated as follows:

First, that the value of property which the decedent has ceased to own—in other words, the property of another—is used to measure the amount of the tax.

[fol. 21] Second, that the tax as imposed by the act is not a tax on the transfer of the property of the decedent but a tax on property itself not owned by him at the time of his death.

Third, that the decedent when he parted with the title to this property could not anticipate that the tax now sought to be levied would be imposed.

It is perfectly clear that the first two of these matters might be urged with as much force in a case where the act, after its enactment, was applied to a transfer in contemplation of death as they could to a transfer made prior thereto. In both cases the value of property which the decedent had ceased to own is used to measure the tax; in both cases the matters stated in the second objection if applicable at all would apply equally. When we examine the third objection closely we find that it can be made against all or nearly all acts which have provided for the retroactive application of taxes, and if held to be sufficient by itself and alone to render the act in question invalid, the same rule applied would make all retroactive taxing statutes unconstitutional. The answer then to the first two of these objections is that the

Supreme Court has held that these matters will not invalidate a tax upon a transfer made in contemplation of death. Possibly the third objection in view of what has been stated needs no further answer. It may be contended, however, that some of the language used by the majority opinions in the cases of Blodgett v. Holden, 275 U. S. 142, and Untermyer v. Anderson, 276 U. S. 440, tends to support the claim that no retroactive estate tax is valid, but these statements are general and must be held applicable only to the particular facts in the cases as to which the opinions were rendered. Until the Supreme Court should specifically so state, we can not believe that it intended by anything it has said in these two cases last cited to overrule the general principle that a law of Congress imposing a tax may be retroactive in its operation, which has prevailed so long as to be considered settled doctrine. We think it is not without significance that in each case the court made it clear that it was not ruling on a case where the transfer was made in contemplation of death, and that the court has in three cases, where the validity of retroactive estate and gift taxes was involved, emphasized the fact that in the case under consideration the transfer in question was not made in contemplation of death. By reason of this feature of the case at bar we conclude that the tax in question is not unconstitutional.

Counsel for defendant contends that the tax in fact was not retroactive but was merely a continuation with a changed rate of the statute that had previously ben in force, but the conclusions we have heretofore reached make it unnecessary to consider this proposition.

It follows that plaintiffs petition must be dismissed and it is so ordered.

Williams, Judge; Littleton, Judge, and Booth, Chief Justice, concur.

CONCURRING OPINION

GRAHAM, Judge, concurring in the result:

The petitioners are executors of the estate of Seth M. Milliken, deceased. The taxing act of 1916 was passed on the 8th day of September, 1916. In December of 1916 the

[fol. 22] said Milliken made a gift in contemplation of death and transferred 2,713 shares of the stock of Minot Mills, Inc., to his three children. Between the date of the gift and the date of his death the act of 1918 was passed, becoming effective in February, 1919. The testator died on March 5, 1920. The act of 1916 and the act of 1918 each contained provisions levying a tax on gifts made during life but "in contemplation of death." The pertinent sections [1] of the acts are in footnote.

---

[1] Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (39 Stat. 777-778.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*) except in case

It will be seen from an examination of these sections in the two statutes that they are verbatim except the language (in the act of 1918) "at any time" and "whether such transfer or trust is made or created before or after the passage of this act." Under the facts here it is to be noted—

(1) That the gift in this case was not made before the passage of the act of 1916 but after, and would clearly have been taxable under that act had the 1918 act not been passed or if the testator had died the day before the passage of the act of 1918.

(2) That as this gift was made "in contemplation of death," it would not make any difference when the testator died. It was liable for tax when he did die, unless Congress by some act relieved the property of liability to taxation, and the inchoate liability having already attached, it is a reasonable construction of the retroactive clause as to this case and similar ones that Congress at least intended the provision to reach such cases and had them in mind, therefore intending by the act of 1918 to continue into the act of 1918 an inchoate liability incurred under the act of 1916. If this be true, it is reasonable to hold that it did not intend to repeal the act of 1916 as to such cases.

(3) But we are not left with only this view to stand upon. Congress in the act of 1918, after repealing certain titles of the acts of 1916 and 1917, among them Title II of the act of 1916, which included the sections quoted in footnote, used this language (40 Stat. 1150):

"Such parts of acts [meaning acts repealed] shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * * Provided, That, except as otherwise provided in this act, no taxes shall be collected

---

of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (40 Stat. 1097.) (Italics mine.)

under Title I of the revenue act of 1916 [which contains the sections involved here] as amended by the revenue act of [fol. 23] 1917, or Title I or II of the revenue act of 1917, in respect to any period after December 31, 1917. [Note the language, "except as otherwise provided in this act."] Provided, further, That the assessment and collection of all estate taxes * * * which have accrued under Title II of the revenue act of 1916 * * * shall be according to the provisions of Title IV of this act [which contains the sections involved here]. In the case of any tax imposed by any part of an act herein repealed, if there is a tax imposed by this act in lieu thereof, the provisions imposing such tax shall remain in force until the corresponding tax under this act takes effect under the provisions of this act."

The tax here "imposed was by" a part of the act of 1916 and the tax imposed by the provision of that act "was imposed by this act [1918] in lieu thereof," and, therefore, "the provisions imposing such tax [1916] shall remain in force until the corresponding tax under this [1918] act takes effect" under its provisions.

Whatever this provision may mean generally, it covers this case and seems to show an intention to carry forward the provision of the act of 1916 into the act of 1918 and make it effective under the provisions of that act by reenacting it, and that as to such reenactments the provision as to repeal would not be effective. This view of the matter is strengthened by the additional language in section 402 (c) of the act of 1918, viz. "whether such transfer or trust is made or created before or after the passage of this act."

According to the construction presented by the petitioners, we would have this situation, namely, that had the donor died the day before the act of 1918 became effective there would have been no question of liability, but if he had died the day after the passage of that act there would be no liability, because the act of 1916 had been repealed and the liability released thereby. Rather than hold that Congress contemplated such an effect by the repealing clause of the act of 1918, it is more reasonable to hold that Congress by reenacting the very words of sections 201 and 202 (b) of the act of 1916 into the act of 1918 intended the 1918 act, as to these sections, to be a continuation of the 1916 act, and that as to these sections of the act of 1916 which were thus re-

enacted it intended that the repeal should not apply. This construction imposes no hardship upon them.

Under the facts of this case there is nothing capricious or arbitrary in the retroactive clause as thus construed. Where the subsequent act from its provisions gives reasonable grounds for holding that it was a continuation of the previous act, even though there has been a formal repeal, it will be held to be a continuation of the old act with modification contained in the new. See the following cases: Campbell v. California, 200 U. S. 87; Steamship Co. v. Joliffe, 2 Wall. 450, 458, 459; Gulf, Colo. & Santa Fe Railway Co. v. Dennis, 224 U. S. 503, 507; Wright v. Oakley, 5 Metcalf, 400; and Bear Lake and River Water Works and Irrigation Co. v. Garland, 164 U. S. 1, 11, 12.

In the case of Campbell v. California, 200 U. S. 87, in which the court cited with approval the Joliffe and Wright cases, the court spoke of the general and continuing nature of the legislation contained in the statute. The legislation involved in the Campbell case was an inheritance tax law [fol. 24] The facts in the case of Steamship Co. v. Joliffe, supra, which is a leading case, were that a pilot under a contract authorized by statute earned certain pilot fees. The act authorizing the fees was repealed. The court in holding that the second act was a continuation of the first in spite of the repealing clause, said:

"* * * The new act reenacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half-pilotage fees under the same circumstances as provided in the original act. * * * The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

And the court in its opinion quotes the following language of Chief Justice Shaw in Wright v. Oakley, 5 Metcalf, 406:

. . . but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones.

In Gulf, Colo. & Santa Fe Railway Co. v. Dunn, supra, where there was involved a statute containing a simultaneous repeal and reenactment of a prior statute, the court said:

"During its pendency in this court the legislature of the State passed a new statute embodying the provisions of the prior law, with some modifications, and also in terms repealing it. The point was then made that the repealing clause terminated the right to recover, and therefore that the action could no longer be maintained. And while the question whether the simultaneous reenactment and repeal of the prior law interrupted its continuity was a question of local law, upon full consideration and the conclusion was reached that in practical operation and effect there was no repeal, but only a continuance of the prior law. . . ."

In the Boise Lands and Water Works and Irrigation Co. case, supra, it is said:

". . . although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1881 when those sections have not been in force. . . . Considering, therefore, that formal repeal, it is, as we think, entirely correct to say that the new act should in contemplation be a continuation of the old with the modifications contained in the new act."

The case cited with approval Steamship Co. v. Joliffe, supra.

In all of these cases it was held that the mere repeal does not make the question of the application of a statute a moot question, and that if the enjoyment act is of the general and continuing nature of the legislation contained in the

[fol. 25] previous act," they should be treated as one act.

I am the more impelled to this construction of the act as it eliminates the question of constitutionality of the act of 1918. In passing upon the constitutionality of a law it has been the undeviating rule of the Supreme Court to so construe the act involved as to uphold, if possible, its constitutionality. It is a rule of which the courts must be carefully mindful in the performance of this "gravest and most delicate duty." It is well settled that among other matters to be taken into consideration as to two interpretations of a statute, the one destroying and the other saving the constitutionality of the act, it is the court's duty to adopt the latter. The right of the Federal courts to declare an act of Congress unconstitutional has been upheld and accepted, though there have been charges of judicial usurpation at different periods in the history of the country, even within the last decade, but the annulment of an act on constitutional grounds must be avoided if possible, and the courts have even gone the length of giving very strained constructions to statutes in order to accomplish this purpose. See United States v. Jin Fuey Moy, 241 U. S. 394, 401, 402, and United States v. Delaware & Hudson Company, 213 U. S. 366, 407, 408.

There is still another view of this case. As stated, this is a case of a gift "in contemplation of death." In this it differs from the cases of Nichols v. Coolidge, 274 U. S. 531, 541, in which the court said:

"* * * The right to become beneficially entitled is not the occasion for it. There is no claim that the transfers were made in contemplation of death or with purpose to evade taxation."

And in Blodgett v. Holden, 275 U. S. 142, 146, the court said:

"* * * transferred by gifts inter vivos, and not in contemplation of death, * * *."

In Untermyer v. Anderson, 276 U. S. 440, 445, it was stated:

"* * * And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully con-

summated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the fifth amendment."

It thus seems that in these three cases, in holding a taxing act for the purpose of raising revenue unconstitutional under the particular facts of those cases, the case of gifts made "in contemplation of death" was expressly reserved, and the language of the court seems to indicate that in those cases, if the gifts had been made "in contemplation of death," the decision might have been different.

As it has been the policy of this court not to adjudge an act of Congress unconstitutional, and of the Supreme Court, as heretofore stated, to construe an act so as to uphold its constitutionality if possible, and in view of the interpretation which I give the act of 1918 as a continuation of the act of 1916 as far as the sections of the act in dispute here are concerned, and the evident exception from the three decisions supra of gifts made in contemplation of death, I concur in the result reached by the court.

V. JUDGMENT

[fol. 26] At a Court of Claims held in the City of Washington on the 17th day of February, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against the plaintiffs, in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law. No printing having been done by the court in this case, no costs are taxed.

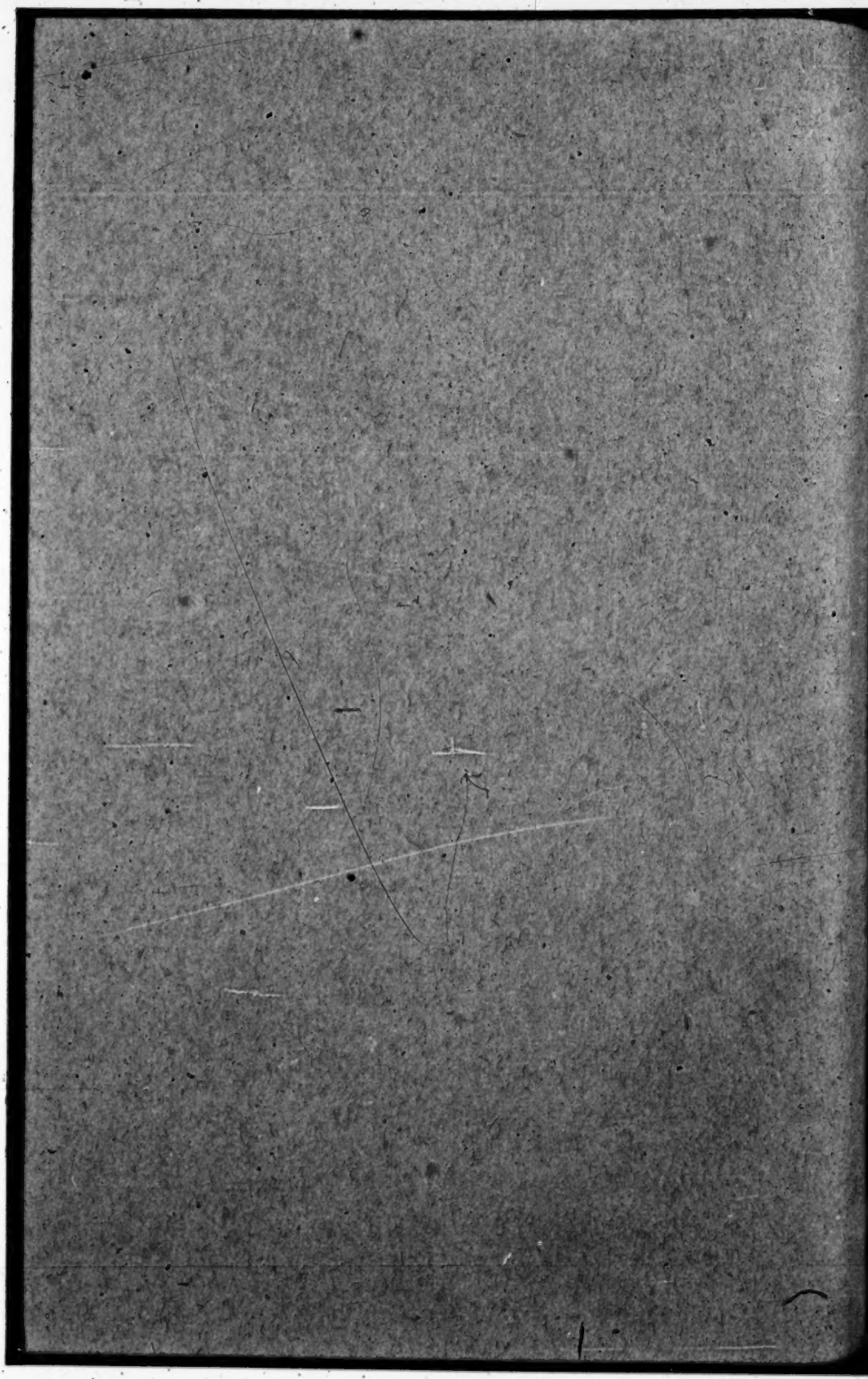
[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,955. Court of Claims. Term No. 824. Seth M. Milliken, Gerrish H. Milliken, and Harold A. Hatch, executors of the estate of Seth M. Milliken, deceased, petitioners, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed April 19, 1930. File No. 34,955.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Estate of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION.

D. A. EMBURY,
Attorney for Petitioners,
63 Wall Street,
New York, N. Y.

CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
ARGUMENT	4
(a) Importance of the Issue	4
(b) Nichols *v.* Coolidge	5
(c) Reenactment Theory	9
(d) Necessary Adjunct Theory	11
(e) Retroactivity of Excise Taxes Generally	12
(f) Summary	13
CONCLUSION	14

CITATIONS.

	PAGE
Anderson *v.* McNeir, 275 U. S. 577	13
Blodgett *v.* Holden, 275 U. S. 142, 276 U. S. 594	13
Campbell *v.* California, 200 U. S. 87	10
Chase National Bank *v.* United States, 278 U. S. 327	7
Crews *v.* Commissioner, 8 B. T. A. 949	10
Duggan *v.* Commissioner, 8 B. T. A. 482	10
Frew *v.* Bowers, 12 Fed. 2nd 625; certiorari dismissed 275 U. S. 578	8
Johnson *v.* Commissioner, 11 B. T. A. 534	11
May *v.* Heiner, U. S.	7
Morsman *v.* Commissioner, 14 B. T. A. 108	11
Nichols *v.* Coolidge, 4 Fed. (2d) 112	7
Nichols *v.* Coolidge, 274 U. S. 531	5, 6, 7, 8, 9, 12
Northern Trust Company *v.* Commissioner, 9 B. T. A. 96	10
Reinecke *v.* Northern Trust Company, 278 U. S. 339	7
Steamship Company *v.* Joliffe, 2 Wall. 450	10
Tyler *v.* United States, U. S.	7
Untermyer *v.* Anderson, 276 U. S. 440	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 824.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, as Executors of the Estate of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims (R. 14) is not yet reported.

Jurisdiction.

The judgment of the Court of Claims was entered February 17th, 1930, (R. 29). The Petition for Certiorari was filed April 19th, 1930. Jurisdiction to issue the Writ is conferred by Section 3(b) of the Act of February 13th, 1925, (43 Stat. 939).

The Question Presented

The sole question presented respects the constitutionality of the provisions of Section 402(c) of the Revenue Act of 1918 (40 Stat. 1097) in purporting to tax retroactively as a part of the net estate of a decedent dying after the effective date of that Act property transferred by him by way of a gift made in contemplation of death several years prior to the passage of the Act, in purporting to value such property for the purpose of such tax at its value at the time of death irrespective of its value at the time of the gift, and in purporting to impose the tax at the rates provided by such Act, such rates being approximately two and one half times as great as the rates provided by the somewhat similar Act in effect at the time of the making of the gift.

Statutes Involved

The pertinent provisions of the Revenue Act of 1918 under which the gift is sought to be taxed, together with the corresponding provisions of the 1916 Act in effect at the time of the making of the gift, are set forth in full in the Petition (R. 2-3).

Statement of Facts

In December, 1916, decedent herein made a gift to his three children, Gerrish H. Milliken, Seth M. Milliken and Margaret M. Hatch, of 2,713 shares of the capital stock of Minot Mills, Inc. Decedent died March 5th, 1920. The stock in question was not included as a part of decedent's estate under the Federal estate tax returns filed by the Petitioners herein as his executors.

Subsequently, the Commissioner redetermined the tax due in respect of said estate, included the stock in question

as constituting a gift made in contemplation of death within the purview of Section 811(c) of the Act, valued and fixed at the sum of $2,000,000 as representing its value at the time of decedent's death, and assessed an additional tax against the estate in the sum of $830,917.24, of which amount $811,360.41 resulted from the inclusion as a part of the taxable estate of the subject matter of the gift. This additional tax was duly paid, claim for refund was filed and denied, and suit for the recovery of the tax was brought in the Court of Claims, in connection with which suit Petitioners waived any right to assert that the gift in question did not in fact constitute a transfer in contemplation of death.

The Revenue Act of 1926 in effect at the time of the making of the gift imposed a tax at a minimum rate of 20% (being the rate on the amount of the net estate in excess of $10,000,000) (39 Stat. 777). This Act, with the subsequent amendments thereto, was repealed by Section 1400 of the Revenue Act of 1932 (47 Stat. 1669-1730), and in lieu thereof, Section 301 of the Revenue Act of 1932 (47 Stat. 2006) provided for a tax at rates running up to 25% on amounts of the net estate in excess of $10,000,000. The bulk of the tax here at issue was imposed at this 25% rate, a small portion being at the 22% rate fixed in respect of the amount of the net estate in excess of $9,000,000 and not in excess of $10,000,000. Accordingly, the rate of tax imposed was approximately two and one-half times as great as the rate to which the gift would have been subject if taxed under the Act in effect at the time it was made. Furthermore, for the purpose of fixing the tax, the property was valued by the Commissioner of Internal Revenue pursuant to the provisions of the Act at its value at the time of decedent's death, over three years subsequent to the time when he had completely, irrevocably, and permanently

divested himself of all interest and title in and to the property and of all dominion and control over it, without reference to the value of the property at the time of the gift or at any other time when it was in decedent's possession or subject to his control.

Petitioners claimed that the Act when so applied was so arbitrary and capricious, so lacking in reasonable and just relation to the classification proposed, as to be confiscatory and in violation of the Fifth Amendment to the Constitution and, in addition, amounted in effect to a direct tax, void for want of apportionment as required by Article I of the Constitution. The Court of Claims found that "the tax in question is not unconstitutional" (R. 22).

ARGUMENT.

a) Importance of the Issue.

The precise issue presented by this case has never heretofore been decided by any federal court. The principle involved is an important one and one of nation-wide import.

Judge Green in the opinion of the Court said (R. 22):

> "*Until the Supreme Court should specifically so state,* we cannot believe that it intended * * * to overrule the general principle that a law of Congress imposing a tax may be retroactive in its operation" (Italics ours).

and in the concurring opinion Judge Graham said (R. 29):

> "It has been *the policy of this Court* not to adjudge an Act of Congress unconstitutional" (Italics ours).

It seems reasonable to assume from these statements contained in the opinions of the Court of Claims that the judges of that Court regarded the issue as one which should be and which presumably would be finally passed upon by this Court.

Each of the Revenue Acts from 1916 to 1928, both inclusive, imposes a tax on property transferred by way of gift either made in contemplation of death or intended to take effect at or after death. Each of the four Acts from 1918 to 1926, both inclusive, repealed the last prior Act and enacted new provisions in substantially the same language as the prior Act so far as concerns gifts made in contemplation of death or intended to take effect at or after death, but with different tax rates, and specifically provided that the tax so imposed by such new Act and at the new rates should be given retroactive application. The question here presented is whether such retroactive application is within the constitutional powers of Congress.

It is submitted that, inasmuch as the case involves an important constitutional question which thus far has not been directly passed upon by this Court and which may arise under at least four different Acts of Congress, it should be reviewed by this Court.

b) Nichols *v.* Coolidge.

In *Nichols* v. *Coolidge*, 274 U. S. 531, Mrs. Coolidge and her husband in 1907 had conveyed property in trust to pay the income to the settlors and the survivor of them for life, then to distribute the corpus equally among the five children of settlors, the share of any child predeceasing such survivor to be paid to the persons entitled to take such child's intestate property under the statutes of dis-

tribution in effect at the time of such survivor's death. In 1917 the settlors joined in an assignment to the five children of their life interests previously reserved. Mrs. Coolidge died in 1921.

The Government asserted that the transfer was one intended to take effect at or after death within the contemplation of Section 402(c) of the 1918 Act and therefore subject to tax. This Court held (p. 543) that the Section in question

> "in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, its arbitrary, capricious and amounts to confiscation."

Petitioners claim that to include in a similar manner the value of property similarly transferred several years prior to the passage of the Act under which it is sought to be taxed, merely because the transferor at the time of the transfer may have thought he was about to die is even more clearly arbitrary, capricious, and confiscatory. In both cases, the theory of taxability advanced by the Government rests on the intent or frame of mind of the transferor at the time of the transfer, irrespective of subsequent events, irrespective of the irrevocable nature of the transfer, irrespective of changing values of the property, and irrespective of the fact that the Act under which the tax is asserted was not in existence at the time the transfer was made.

In the case of a gift intended to take effect at or after death, the full and unrestricted possession, use, and enjoyment of the property does not vest absolutely until the

donor's death. In the *Coolidge* case, for example, the Coolidge children could not "come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it" until the death of Mrs. Coolidge. (See opinion of District Judge Brewster, 4 Fed. (2d) 112, 115.)

In the case of a gift in contemplation of death, on the other hand, the entire interest, control, use, possession, and enjoyment of the property passes to the donee irrevocably and without limitation or qualification at the time of the gift. There is no retention by the donor of "control, possession or enjoyment" (see *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, 348). There is no bringing about "at death, the completion of that shifting of economic benefits of property which is the real subject of the tax" (see *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *May* v. *Heiner,* U. S. , decided April 14, 1930, not yet reported). The property is not as a consequence of death relieved from restrictions previously imposed under the transfer (see *Tyler* v. *United States,* U. S. , decided May 19, 1930, not yet reported). The subsequent death of the donor has no effect upon the property transferred or the donee's interest in and use and enjoyment of such property. His death is in no sense a "generating source" of transmission of the property or succession to it.

This Court in its opinion in the Coolidge case emphasizes one further feature as to which the case now under consideration is on all fours, and that is the arbitrary and capricious basis provided by the Act for measuring the tax. At page 542 of the decision in the *Coolidge* case, this Court said:

> "Property of small value transferred before death may have become immensely valuable and the

> estate tax, swollen by this, may leave nothing for distribution * * * Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died"

and what this Court there said is equally true in its application to the instant case. Judge Green, commenting in the decision of the Court of Claims on the objections raised by the Petitioners to this feature of the statute by which the tax on decedent's estate is measured by value of property long since disposed of, answered (R. 21) that these objections

> "might be urged with as much force in a case where the act, after its enactment, was applied to a transfer in contemplation of death as they could to a transfer made prior thereto. In both cases the value of property which the decedent had ceased to own is used to measure the tax".

There may well be grave doubt as to the validity of the method thus provided by the Act for measuring the taxable value of estates but, however arbitrary the method may be when applied to gifts made subsequent to the passage of the law, its capricious character is enhanced many fold when applied retroactively. Circuit Judge Hand, in *Frew* v. *Bowers* (12 Fed. 2nd, 625, 630; certiorari dismissed 275 U. S. 578), commenting on this method of measuring the tax, said:

> "As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. * * * Such a tax is fixed by the mere sport of fortune. It has no more

relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

c) Reenactment Theory.

Judge Graham of the Court of Claims in his concurring opinion (R. 22-29) seeks to draw a distinction between this case and the *Coolidge* case in that the original declaration of trust in the *Coolidge* case was made prior to the passage of the 1916 Act, the first of the series of Acts imposing a federal estate tax, whereas the gift in the present case, although made prior to the passage of the 1918 Act under which the tax was imposed, was made after the 1916 law imposing an estate tax and providing that such tax should apply to gifts made in contemplation of death had been passed. It is not claimed that the saving clause under the 1918 Act operated so as to subject the gift in this case to tax under that Act if the 1918 provisions failed to apply but, because Section 1400 of the 1918 Act (40 Stat. 1150) provides that where the 1918 Act imposes a tax in lieu of a tax under the repealed 1916 Act the provisions of the 1916 Act should remain in force until the corresponding tax under the 1918 Act took effect, Judge Graham argues that it was the manifest intention of Congress to carry forward the provisions of the 1916 Act here in question into the Act of 1918 and make them effective under the later Act by a reenactment "and that as to such reenactments the

provision as to repeal would not be effective" and this view, he states (R. 25), "is strengthened by the additional language of Section 402(c) of the Act of 1918, viz., 'whether such transfer or trust is made or created before or after the passage of this Act'."

The gift in question, if taxable under the 1916 Act, would have been taxed at 10%. Under the 1918 Act, substantially the entire amount was taxed at 25%. It is difficult to see how an Act specifically repealing an earlier law and imposing a tax two and one-half times as great as that provided for by the earlier law can be deemed to constitute a mere "reenactment" or "continuation" of the old law. Nor do the cases cited under Judge Graham's concurring opinion sustain this contention, for these are cases in which the liabilities sustained by the Court had accrued prior to the repeal of the Act in question and were upheld, not as liabilities under the new Act, but as liabilities accrued under the old Act on the general theory that the repeal did not operate to destroy accrued liabilities. If the facts of the present case could be brought within the purview of the cases cited by Judge Graham, such as *Campbell* v. *California,* 200 U. S. 87, and *Steamship Co.* v. *Joliffe,* 2 Wall. 450 (which they cannot), those cases would stand for the proposition that the tax should be imposed at the rates provided by the 1916 law and not the rates imposed by the 1918 law. But the 1916 Act and its rates were fully repealed by the 1918 Act and no claim is here made by the Government that a tax had accrued and should be paid under the 1916 Act.

Furthermore, this same contention has been advanced in numerous cases before the U. S. Board of Tax Appeals and there rejected (See *Duggan* v. *Commissioner of Internal Revenue,* 8 B. T. A. 482; *Crews* v. *Commissioner,* 8 B. T. A. 949; *Northern Trust Co.* v. *Commissioner,* 9 B. T. A. 96;

Johnson v. *Commissioner,* 11 B. T. A. 534; *Morsman* v. *Commissioner,* 14 B. T. A. 108), and it is respectfully submitted that this issue should be passed upon by this Court in order to avoid the confusion that would otherwise result from conflicting rulings of the Board of Tax Appeals and the Court of Claims.

d) "Necessary adjunct" Theory.

Neither can the imposition of the tax under circumstances such as here presented be sustained, as claimed by the Treasury Department, as a necessary adjunct to the legislative right to impose an estate tax and for the purpose of preventing evasion of such tax. Gifts in contemplation of death are gifts made *in extremis,* or at least under circumstances such that the impelling motive for the gift is the expectation of death in the near future.

Bearing this in mind, let us examine the possibility of creating, for the express purpose of evading the estate tax, a state of facts such as here presented. First of all, the gift would not be made until the donor had occasion to anticipate death in the reasonably near future for otherwise it would not be made in contemplation of death within the legal significance of those words and therefore would not be taxable. Secondly, having made such gift with death in the immediate or near future as the impelling motive, the donor would require the power to postpone the date of his death for several years and until such time as Congress might see fit to repeal the existing act and to enact a new law imposing different tax rates. Obviously, no such power exists. Therefore to say that it is necessary to sustain the retroactive provisions of Section 402 (c) in order to prevent evasion of estate tax laws is to imply that one may

regulate at will that which is beyond human power to control.

It is submitted that this fact was recognized by this Court in the *Coolidge* case, *supra*, when it said (p. 542):

> "Undoubtedly, Congress may require that property *subsequently* transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but *the right is limited by the necessity.*" (Italics ours.)

Judge Green, in the opinion of the Court of Claims, construes this language (R. 19) as meaning that there was an "open question" whether gifts in contemplation of death might be retroactively taxed, a question which the Court of Claims has answered in the negative. But since "the right is limited by the necessity" and, as has been shown, no necessity exists in respect of gifts made prior to the passage of the Act under which they are sought to be taxed, petitioners contend that the language above quoted constitutes an authority for the proposition that gifts *subsequently* made, and such gifts only, may be taxed.

e) Retroactivity of Excise Taxes Generally.

Although this Court has frequently sustained statutes imposing retroactively and within reasonable limits a direct tax, including federal income taxes, it has uniformly refused to sustain the imposition of an excise upon a transaction or event fully and irrevocably consummated prior to the passage of the taxing statute. This it has done not only

in connection with the estate tax but also in connection with the gift tax imposed by the Act of June 2, 1924. (See *Anderson* v. *McNeir*, 275 U. S. 577; *Blodgett* v. *Holden*, 275 U. S. 142; 276 U. S. 594; *Untermyer* v. *Anderson*, 276 U. S. 440.) In the present case not only does the Treasury Department seek to impose the tax retroactively but, as above pointed out, the property is taken at a value which it had attained years after the gift in question was made.

It is true that at the time of the making of the gift in question there was in effect an Act imposing a tax on gifts made in contemplation of death. But that Act had been repealed prior to decedent's death and a new law had been enacted imposing a tax two and one-half times as great. It is submitted that if Congress is without power to impose retroactively a tax at the rate of 10% in respect of a gift not taxable at the time it was made, it is equally without power to impose retroactively a tax at the rate of 25% on a gift which was taxable at the rate of 10% at the time it was made.

f) Summary.

The fact that the case involves a constitutional question of general importance and of a recurring nature, the fact that the decision of the Court of Claims is contrary to the principle adopted in numerous decisions of the Board of Tax Appeals, the fact that the decision of the Court of Claims cannot be reconciled with the principles enunciated in analogous cases decided by this Court, and the fact that the decision of the Court of Claims operates to produce an inequitable, capricious, and grotesque result in this and in other cases to which it may be applied, all suggest the de-

sirability of a decision by this Court definitely determining the issue here presented.

Conclusion.

It is respectfully submitted that a Writ of Certiorari should be granted.

D. A. Embury,
Attorney for Petitioners,
63 Wall Street,
New York, N. Y.

Curtis, Mallet-Prevost, Colt & Mosle,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

D. A. EMBURY,
Attorney for Petitioners,
63 Wall Street,
New York, N. Y.

HUGO KOHLMANN,
CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	1
Issue Involved	2
Statutes Involved	2, 61
Assignments of Error	3
Statement of Facts	3
Outline of Argument	6
POINT I. Section 402(c) of the Revenue Act of 1918, construed in the light of recent decisions, does not apply to the transaction here at issue	7
POINT II. Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this Section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death	15
POINT III. The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents	25

PAGE

POINT IV. In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment 30

POINT V. The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution 38

POINT VI. The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act 42

POINT VII. The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question 47

POINT VIII. The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption 52

Conclusion 60

TABLE OF AUTHORITIES.

Cases Cited.

	Page
Almy *v.* California, 24 How. 169	41
Anderson *v.* McNeir, 16 Fed. (2nd) 970; reversed on confession of error, 275 U. S. 577	19
Arenac County *v.* Iosco County, 158 Mich. 344	18
Barclay Co. Inc. *v.* Edwards, 267 U. S. 442	18, 32
Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1	53, 56
Blodgett *v.* Holden, 275 U. S. 142	14, 19, 42
Bradley *v.* Nichols, 13 Fed. (2nd) 857; affd. 27 Fed. (2nd) 47	33
Brady *v.* Ham, C. C. A. 1st Circuit No. 2459, decided Nov. 26, 1930, not yet reported	8, 42
Brown *v.* Maryland, 12 Wheat. 419; 25 U. S. 554	41, 42
Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1	17
Campbell *v.* California, 200 U. S. 87	18, 52, 53
Carroll *v.* Greenwich Insurance Co., 199 U. S. 401	18
Carter *v.* Witcomb, 74 N. H. 482	18
Chase National Bank *v.* United States, 278 U. S. 327	8, 9, 42
Collateral Inheritance Tax, *In re*, 88 Me. 587	18
Commissioner *v.* Northern Trust Co., 41 Fed. (2nd) 732	7, 9, 23, 42
Commonwealth *v.* McCauley's Executors, 166 Ky. 450	18
Commonwealth *v.* Wellford, 114 Va. 372	18
Cook *v.* Pennsylvania, 97 U. S. 566	41
Coolidge *v.* Loring, 235 Mass. 220	23
Coolidge *v.* Nichols, 4 Fed. (2nd) 112; affd. 274 U. S. 531	23
Cooper *v.* United States, 280 U. S. 409	21
Dane *v.* Jackson, 256 U. S. 589	18
Dawson *v.* Kentucky Distilleries Co., 255 U. S. 288	40, 41

PAGE

Erskine *v.* White, D. C. Mass. Dist. No. 4272, decided Oct. 1, 1930, not yet reported 23
Eury's Executors *v.* State, 72 Ohio St. 448 18

Farmers Loan & Trust Co. *v.* Bowers, 29 Fed. (2nd) 14 23
Flanigan *v.* Sierra County, 196 U. S. 553 ..... 46, 49
Flannery *v.* Willcuts, 25 Fed. (2nd) 951 47
Flint *v.* Stone Tracy Co., 220 U. S. 107 39
Forbes Boat Line *v.* Board of Commissioners, 258 U. S. 338 42
Frew *v.* Bowers, 12 Fed. (2nd) 625; certiorari dismissed, 275 U. S. 578 ..... 25, 31, 32, 38, 42

Gulf, etc. Railway *v.* Dennis, 224 U. S. 503 53
Gulf, etc. Railway *v.* Ellis, 165 U. S. 150 ..... 18, 55, 56

Hanna *v.* United States, 68 Ct. Cls. 45; certiorari denied, 280 U. S. 612 47
Hartman *v.* Greenhow, 102 U. S. 672 ..... 18, 31
Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592 19
Hertz *v.* Woodman, 218 U. S. 205 49
Hill *v.* Nichols, 18 Fed. (2nd) 139 33
Hodgkins *v.* Commissioner, C. C. A., 7th Circuit No. 4178; decided Oct. 16, 1930; not yet reported 7, 9, 23, 42
Hunt *v.* Wicht, 174 Cal. 205 18

Kansas City Railway *v.* Kansas, 240 U. S. 227 40
Knowlton *v.* Moore, 178 U. S. 41 ..... 17, 25, 30, 31
Knox *v.* McElligott, 258 U. S. 546 58

Lacy *v.* Treasurer, 152 Ia. 477 18
Langdon, *Matter of*, 153 N. Y. 6 18
Lansing, *Matter of*, 182 N. Y. 238 18
Levy *v.* Wardell, 258 U. S. 542 ..... 17, 34, 37, 40, 42, 58
Lewellyn *v.* Frick, 268 U. S. 238 37

PAGE

McCardle, *ex parte*, 7 Wall. 506 46
McCaughn *v.* Carnill, 43 Fed. (2nd) 69 ..... 7, 9, 23, 42
McNeir *v.* Anderson, 275 U. S. 577 ..... 19, 42
Mahan *v.* Plank, 289 Fed. 722 27
Maxwell *v.* Bugbee, 250 U. S. 525 18
May *v.* Heiner, 281 U. S. 238 ..... 7, 9, 23, 42
Murphy *v.* Utter, 186 U. S. 95 58

National Paper & Type Co. *v.* Bowers, 266 U. S. 373 18
Nichols *v.* Bradley, 27 Fed. (2nd) 47 33
Nichols *v.* Coolidge, 274 U. S. 531,
15, 19, 23, 24, 26, 33, 37, 42, 43

Page *v.* Skinner, 298 Fed. 731; certiorari denied, 266 U. S. 625 ..... 46, 47, 58
Pana *v.* Bowler, 107 U. S. 529 58
Pell, *Matter of*, 171 N. Y. 48 18
Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601 16

Rafferty *v.* Smith Bell & Co., 257 U. S. 226 29
Reinecke *v.* Northern Trust Co., 278 U. S. 339,
8, 9, 10, 23, 25, 42

Saltonstall *v.* Saltonstall, 276 U. S. 260 34
Schlesinger *v.* Wisconsin, 270 U. S. 230 ..... 25, 29
Shukert *v.* Allen, 273 U. S. 545 24
Shwab *v.* Doyle, 258 U. S. 529 ..... 13, 58, 59
South Carolina *v.* United States, 39 Ct. Cls. 257; affd. 199 U. S. 437 39
Spangler's Estate, 281 Pa. St. 118 ..... 12, 18
Stanford, Estate of, *v.* California, 126 Cal. 112 53
State *v.* Safe Deposit & Trust Co., 132 Md. 251 18
Stauffer, Succession of, 119 La. 66 18
Steamship Co. *v.* Joliffe, 2 Wall. 450 ..... 53, 54, 56

Taft *v.* Bowers, 278 U. S. 470 21
Thames & Mersey Insurance Co. *v.* United States, 237 U. S. 19 42
Thomas *v.* United States, 192 U. S. 363 39
Tozer *v.* Probate Court, 102 Minn. 268 18

PAGE

Union Trust Co. *v.* Wardell, 258 U. S. 537 58
United States *v.* American Sugar Refining Co., 202 U. S. 563 29
United States *v.* Burr, 159 U. S. 78 29
United States *v.* Heinszen, 206 U. S. 370 29
United States *v.* Hvoslef, 237 U. S. 1 41
United States *v.* Tynen, 11 Wall. 88 58
Untermyer *v.* Anderson, 276 U. S. 440 ..... 19, 26, 42, 44

Welton *v.* Missouri, 91 U. S. 275 41
Wilmington Trust Co. *v.* United States, 28 Fed. (2nd) 205 46
Wright *v.* Oakley, 5 Met. 406 ..... 53, 54

STATUTES PRINTED.

Revenue Act of September 8, 1916, 39 Stat. 777-778,
Sec. 201 61
Sec. 202 61

Revenue Act of March 3, 1917, 39 Stat. 1002,
Sec. 300 62
Sec. 301 62

Revenue Act of October 3, 1917, 40 Stat. 324-325,
Sec. 900 62

Revenue Act of February 24, 1919 (Revenue Act of 1918), 40 Stat. 1096-1101, 1149,
Sec. 401 63
Sec. 402(c) 63
Sec. 409 64
Sec. 1400(a) 64
Sec. 1400(b) 65

Statutes Cited.

PAGE

Judicial Code—Act of November 13, 1925, Chap. 229, Sec. 3, 43 Stat. 939 1

Revenue Act of September 8, 1916 ..... 43, 45, 46, 47, 48, 50, 52, 56, 58, 59

Revenue Act of March 3, 1917 ..... 43, 46, 47, 50, 52, 58, 59

Revenue Act of October 3, 1917 ..... 43, 46, 47, 52, 58, 59

Revenue Act of February 24, 1919,
Sec. 401 ..... 8, 11, 12
Sec. 402(c) 7, 8, 10, 12, 14, 15, 16, 24, 43, 46, 48, 59, 60
Sec. 409 37
Sec. 1400 ..... 44, 46, 47, 50, 52, 57

Revenue Act of 1918,
Sec. 113, 45 Stat. 818 21

Regulations Quoted.

Regulations 63, Art. 18 2
Regulations 74, Arts. 593, 595 21

Miscellaneous Citations.

26 Columbia Law Review 852 39
Endlich: Statutory Construction 49
37 Harvard Law Review 694 ..... 38, 39
Lewis's Sutherland: Statutory Construction 49

Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Claims (R. 14) is printed in 69 Ct. Cls. 231 and also in 38 Fed. (2nd) 381.

Jurisdiction.

Judgment of the Court of Claims was entered February 17th, 1930 (R. 29). Petition for Writ of Certiorari to review the judgment of the Court of Claims was filed April 19th, 1930, and was granted October 13th, 1930. Jurisdiction is conferred by Section 3(b) of the Act of February 13th, 1925 (43 Stat. 939).

The Issue.

The case presents two questions for consideration:

(1) Should Section 402(c) of the Revenue Act of 1918 be so construed as to include, as a part of the net estate of a decedent dying in 1920, at its value at the time of his death and subject to tax at the rates provided by said 1918 Act, property transferred by the decedent in contemplation of death in December, 1916, over three years prior to his death and over two years prior to the passage of the Act under which the tax is sought to be imposed?

(2) If the answer to the first question be in the affirmative, do the provisions of the Act purporting to tax such transaction upon the basis of the values and at the rates therein provided violate the provisions of the Constitution of the United States and amendments thereto?

Statutes Involved.

The pertinent provisions of the Revenue Act of 1918 and the corresponding or analogous provisions of the Act of September 8th, 1916, the Act of March 3rd, 1917, and the Act of October 3rd, 1917, are set forth in the appendix hereto (pp. 61-65).

The phrase "in contemplation of death", while not defined in any of the statutes, is defined in Article 18 of Regulations 63 under the 1918 Act as follows:

> "Art. 18. Nature of transfer. The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer,

however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. * * *"

Assignments of Error.

I. The Court of Claims erred in construing Section 402(c) of the Revenue Act of 1918 as purporting to impose a tax on the transaction here in question.

II. The Court of Claims erred in holding that the provisions of said Section 402(c) of the Revenue Act of 1918, if construed so as to tax the transaction here in question, were not arbitrary and capricious and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

III. The Court of Claims erred in holding that the provisions of said Section 402(c) of the Revenue Act of 1918, if construed so as to tax the transaction here in question, were not in violation of the provisions of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution of the United States.

IV. The Court of Claims erred in entering judgment in favor of the United States.

Statement of Facts.

Petitioners are the duly qualified executors of the last Will and Testament of the decedent, Seth M. Milliken, who died a resident of the City and State of New York March 5th, 1920 (R. 15). In December, 1916, over three years

prior to his death, decedent had transferred by way of gift to his three children 2,713 shares of the capital stock of Minot Mills, Inc., 1,000 shares to his son, Gerrish H. Milliken, 1,000 shares to his son, Dr. Seth M. Milliken, and 713 shares to his daughter, Margaret M. Hatch (R. 15). In the estate tax returns originally filed by the executors, these shares were shown under Schedule E as a transfer made more than two years prior to death without consideration but not believed to have been in contemplation of or intended to take effect in possession or enjoyment at or after death. They were not included in such returns as a part of the taxable estate (R. 15) and the tax of $1,552,640.27 originally paid under such returns (R. 12) was exclusive of any tax on these shares.

Subsequently, the Commissioner redetermined the tax, found that the transfer in question was one made in contemplation of death, made several adjustments as to minor details not here involved and assessed an additional tax of $830,917.24, of which amount the sum of $812,165.42 resulted from the inclusion in the taxable estate of the decedent of the shares in question at their value at the time of decedent's death, which value the Commissioner found to be $3,308,720.54 (R. 15).

The additional tax so assessed was paid by the petitioners on March 10th, 1926 (R. 15). Claim for Refund of said sum of $812,165.42 was duly filed and rejected (R. 16) and suit was brought in the Court of Claims for the recovery of said sum, together with interest from the 10th day of March, 1926 (R. 10). The Court of Claims found that the tax was properly assessed and collected, and accordingly entered judgment dismissing the Petition (R. 29). The case is here on certiorari to review the judgment of the Court of Claims.

The attendant circumstances surrounding and leading up to the gift of the stock in 1916 were fully set forth in the Stipulation of Facts filed in the Court below. However, in connection with the proceedings before that Court and as a part of such Stipulation of Facts, the plaintiffs waived any right to contest the finding of the Commissioner that the gift was made in contemplation of death (R. 15). The Court, in its special findings of fact, instead of setting forth all the facts as stipulated, saw fit to paraphrase and condense the Stipulation, omitting all the special circumstances surrounding the gift and contenting itself with pointing out that plaintiffs had waived any right to assert that the transfer in question was not, as a matter of fact, a transfer by the decedent in contemplation of death.

This undoubtedly is sufficient for all the purposes with which we are here concerned except, perhaps, that it should be noted that the determination of the Commissioner of Internal Revenue that the transfer was made in contemplation of death, the right to contest which determination was waived by the petitioners, amounted only to a finding that the transfer was actuated "by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty" as provided by Article 18 of the Commissioner's Regulations 63 then in effect, and that there is nothing in the facts of the case tending to indicate that the gift was in any manner influenced by considerations of inheritance tax liability or was in any sense a part of any attempt to evade taxes.

Argument.

For purposes of convenience, the points of the petitioners' argument will be considered *seriatim* in the order in which the several points involved are considered in the Opinion of the Court of Claims:

I. Section 402(c) of the Revenue Act of 1918, construed in the light of recent decisions, does not apply to the transaction here at issue.

II. Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this Section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death.

III. The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents.

IV. In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment.

V. The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution.

VI. The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act.

VII. The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question.

VIII. The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption.

POINT I.

Section 402(c) of the Revenue Act of 1918 construed in the light of recent decisions does not apply to the transaction here at issue.

In the Court below, petitioners advanced the arguments hereinafter set forth respecting the constitutionality of Section 402(c) of the Revenue Act of 1918 but did not question the construction placed upon said Section by the Commissioner of Internal Revenue as having been intended by Congress to apply to a state of facts such as here presented (R. 17).

Since the case was there briefed and argued, however, this Court, in *May* v. *Heiner,* 281 U. S. 238, 50 Sup. Ct. Rep. 286, and two Circuit Courts of Appeals in *Commissioner* v. *Northern Trust Co.,* 41 Fed. (2nd) 732, *McCaughn* v. *Carnill,* 43 Fed. (2nd) 69, and *Hodgkins* v. *Commissioner* (C. C. A., 7th Circuit, No. 4178, decided October 16, 1930, not yet reported), have clearly indicated that transfers "intended to take effect in possession or enjoyment at or

after death", as referred to under Section 402(c), are taxable only if and to the extent that the "interest" taxed passes from the possession, enjoyment, and control of the donor at his death and so constitutes a transfer taxable under Section 401. See also *Brady* v. *Ham* (C. C. A., 1st Circuit, No. 2459, decided Nov. 26, 1930, not yet reported.

This Court had previously pointed out in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, that the only Section of the Act imposing the tax (Section 401) does so on the "net estate" of a decedent and that all the items required by Section 402 to be brought into the gross estate for the purpose of computing the tax, unless the items enumerated in Section 402(c) constitute an exception, consist of property passing out of the control, possession, or enjoyment of the decedent at his death. In that case, in *Chase National Bank* v. *United States*, 278 U. S. 327, and in the four cases first above cited, it has been consistently held that interests with respect to which decedent has created a trust to take effect in possession or enjoyment at or after death as mentioned in Section 402(c) do not constitute an exception to this general rule.

In the Reinecke case, this Court said (p. 348):

> "In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

And in *Chase National Bank* v. *United States, supra,* this Court further emphasized the point that the distinguishing feature of taxability is "the donor's bestowal of benefits on another *at death*" and the retention of "control over those benefits with power to direct their future enjoyment *until his death*". (Italics throughout this brief, with the exception of foreign phrases, unless otherwise indicated, are ours.)

In the Reinecke and Chase Bank cases this principle was applied so as to include in the taxable estate, in the one case, the interests under trusts created by the decedent in which he had reserved exclusive power of revocation, and, in the other case, insurance policies taken out by the decedent on his own life in which he had reserved the right to change the designated beneficiary, but so as to exclude from the taxable estate (in the Reinecke case) the interests under trusts in which the right to alter or modify the provisions thereof reserved by the decedent trustor was subject to exercise only by joint action with one or more beneficiaries.

In *May* v. *Heiner, supra,* the trust was to pay the income to the settlor's husband for life, then to the settlor for life, with remainders over; in *Commissioner* v. *Northern Trust Co., supra,* the trust was to pay to the settlor for life, then to children for their respective lives, with remainders over; and in *McCaughn* v. *Carnill* and *Hodgkins* v. *Commissioner, supra,* the trusts were to pay to settlor for life, then to the widow for life, then to children for life, with remainders over. This Court in the May case and the Circuit Courts of Appeals in the other two cases last mentioned, applied the same principle enunciated in the Reinecke and Chase Bank cases and held that, since no interest passed

from settlor to the beneficiaries under the trusts by virtue of the settlor's death, there was no tax.

It seems clear that in all these cases the remaindermen did not acquire "possession or enjoyment" of the property until "at or after" the death of the grantor. On the other hand, the life interest retained by the grantor was not the interest which passed to the remaindermen when the grantor died. That interest "was obliterated by that event". The interest of which the remaindermen received possession and enjoyment upon the death of the grantor had been transferred by the grantor beyond power of recall long before death and at the time of the execution of the trust instrument involved. It therefore formed no part of the actual "net estate" of the decedent as defined by this Court in the Reinecke case and it consequently was held not taxable under Section 402(c).

These decisions in respect of transfers intended to take effect in possession or enjoyment at or after death under Section 402(c) apply with equal force to transfers in contemplation of death under the same Section. The phraseology of this Section clearly indicates that Congress considered gifts in contemplation of death and gifts intended to take effect in possession or enjoyment at or after death in the same category and intended that they should be in all respects similarly treated. The clause in question reads:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death* (whether such transfer or trust is made or created before or after the passage of this Act), * * *"

Here we have not one paragraph treating of transfers in contemplation of death and another paragraph treating of transfers intended to take effect in possession or enjoyment at or after death, not even two separate clauses in the same paragraph, but both thoughts expressing alternative methods of accomplishment woven together in a single phrase, both uttered in the same breath, the one not even set off from the other by so much as a single comma—"*in contemplation of or intended to take effect in possession or enjoyment at or after death*". If there be any language clearer, more forcible, and more free from ambiguity that Congress could have used for the purpose of indicating that these alternative forms of transfers were regarded as of the same type or class subject in all respects to the same interpretation, construction, and treatment, it is difficult to conceive what such language might be.

In the light of the obvious intent of Congress that transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death should be treated alike, it follows from the decisions in the five cases above cited that transfers in contemplation of death, as well as the transfers which were before the Courts in those cases, are taxable only where the interest involved passes from the possession, enjoyment, or control of the decedent at his death, so that the interest so passing constitutes a part of the "net estate" transferred at death within the meaning of Section 401.

In the case at bar, the transfer was outright and not conditional, and took place over three years prior to decedent's death. Not only did no interest pass from the decedent at the time of his death, but there was not even such a change of possession or enjoyment at the time of death as existed

in the cases above cited. No interest was obliterated by the decedent's death, and such death was in no sense a "generating source". The transfer, therefore, was not one involving a devolution of any description at the date of death and, in the light of the reasoning of the Reinecke and other cases above mentioned, was not a transfer coming within Section 402(c). It was not, therefore, subject to the tax imposed by Section 401.

This interpretation, limiting gifts made in contemplation of death to gifts which do not take full effect until death, was precisely the interpretation adopted by the Supreme Court of the State of Pennsylvania in a decision which is directly in point. *Spangler's Estate*, 281 Pa. St. 118. That case involved eighteen appeals raising the issue of the constitutionality of the Pennsylvania Act of 1919 purporting to tax gifts made in contemplation of death or intended to take effect in possession or enjoyment at or after death. The Pennsylvania Constitution provided that

> "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

The title to the Act in question provided for the

> "imposition and collection of certain taxes upon the transfer of property passing from a decedent * * * at the time of his death."

The body of the Act included a tax upon transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death. The question was thus squarely raised whether property so transferred constituted property "passing from a decedent at the time of his death". The Court, after holding that property which

had been so transferred as to vest in possession or enjoyment at or after the death of the transferor did pass from the decedent at the time of his death and was therefore within the expression of the title, continued:

> "The same conclusion must be reached as to the words 'made in contemplation of the death of the grantor, vendor or donor' in the Act of 1919, if they are limited to gifts which do not take full effect before that time. As this is a possible construction, we are bound to adopt it, and thus make the whole of the Act constitutional. If there are any provisions in the body of the statute, which go beyond the limitation stated, they must fall; * * *"

The appropriateness of this construction is particularly apparent in the case of a gift such as the one now under consideration, made several years prior to the enactment of the applicable Act. The tendency of the courts has ever been to avoid attributing to a statute retroactive import wherever such retroactive construction is avoidable. As stated by Mr. Justice McKenna, in *Shwab* v. *Doyle*, 258 U. S. 529, 534:

> "The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact'.
>
> "There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have

> been no foresight or contemplation when they were designed and consummated."

In *Blodgett v. Holden*, 275 U. S. 142, 148, Mr. Justice Holmes, speaking of the Gift Tax Act, said:

> "If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it that way now."

By reading Section 402(c) as intended to tax transfers and trusts in contemplation of or intended to take effect in possession or enjoyment at or after death, only in those cases where the interest in question passes from the possession, enjoyment, or control of the transferor at his death, the parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act", inserted for the first time in the 1918 Act, has in fact no retroactive operation. Under that interpretation the tax would be imposed in respect of the devolution at death occurring after the passage of the Act. Under that interpretation, the tax becomes an excise upon the event of death and not a direct tax upon the property; the basis for determining the value of the property taxed becomes the value of the interest transferred at the time of the actual consummation of the transfer and not at some other and wholly unrelated time; the arbitrary character of the tax and the capricious results otherwise produced by its imposition, as hereinafter noted, are removed; and the statute is freed from the element of retroactivity and from any question as to its constitutionality. So construed, the Act imposes no tax upon the transfer here under consideration, since that

transfer was completely and irrevocably consummated more than three years prior to decedent's death and no interest in the property passed from his possession, enjoyment, or control at the time of his death.

POINT II.

Section 402(c) of the Act, if construed to tax a transfer made before the passage of the Act, is unconstitutional. The decision of this Court in *Nichols* v. *Coolidge* holding this section invalid as to such a transfer intended to take effect in possession or enjoyment at or after death applies *a fortiori* to a transfer made in contemplation of death.

Petitioners claim that Section 402(c) of the 1918 Act, if construed to apply to the facts here at issue, is invalid: first, in that it violates the due process clause of the Fifth Amendment to the Constitution of the United States in purporting to lay an excise in respect of a transfer of property which had been fully and irrevocably completed more than two years prior to the adoption of the Act; second, in that it similarly violates the due process clause of the Fifth Amendment in purporting to lay an excise upon the estate of decedent in respect of property belonging to third persons and not constituting any part of the estate of such decedent and upon the basis of a valuation of such property of third persons bearing no reasonable or necessary relation to the value of any property owned by the decedent either at the time of his death or at any other time.

These contentions are sustained by the determination of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In that case decedent died January 6th, 1921. In July, 1907, she

and her husband had made a transfer of certain property to trustees to pay the income to the settlors, then to the survivor and, after the death of the survivor, to distribute the *corpus* among their five children, and, should any child predecease such survivor, the share of such child to be distributed to those entitled to his intestate property under the statute of distribution then in effect, with a limitation upon the share of a surviving widow. In April, 1917, the settlors assigned to the five children their entire interest in the property, especially their right to the income therefrom. The devolution of the corpus of the trust was, of course, determined solely by the 1907 transfer and was not in any manner affected by the assignment of income made in 1917. The Government claimed that the transfer was one intended to take effect in possession or enjoyment at or after death and that it was, therefore, taxable under Section 402(c) and at the value of the property at the time of decedent's death. This Court said (pp. 542-543):

> "we must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

The principle there enunciated—that a statute purporting to impose a federal tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment—appears to have been first suggested by this Court in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 633, in which there was a suggestion that a tax might be

> "so wanting in uniformity and equality as in substance to amount to deprivation of property without due process of law".

In *Knowlton* v. *Moore*, 178 U. S. 41, 77, this Court suggested the question

> "whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems".

In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24-25, this Court again suggested that a seeming exercise of the taxing power might be

> "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion".

In *Levy* v. *Wardell*, 258 U. S. 542, 544, Mr. Justice McKenna, delivering the opinion of the Court, said:

> "The Act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment."

The same principle was recognized in *National Paper & Type Co.* v. *Bowers*, 266 U. S. 373, and *Barclay Co. Inc.* v. *Edwards*, 267 U. S. 442. It had already been repeatedly recognized in connection with the due process clause of the Fourteenth Amendment as applied to similar state statutes (*Hartman* v. *Greenhow*, 102 U. S. 672; *Gulf, etc., Railway* v. *Ellis*, 165 U. S. 150; *Campbell* v. *California*, 200 U. S. 87; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Dane* v. *Jackson*, 256 U. S. 589) and as stated by Mr. Justice Holmes in *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410:

> "If an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."

In the same manner various state courts in passing upon the issue of retroactive succession and estate taxes have with practical unanimity refused to sustain the tax, either because of the limitation imposed by the due process clause of the Fourteenth Amendment or because of provisions of the State Constitution similar to the limitations of the Fifth and Fourteenth Amendments. *Matter of Pell*, 171 N. Y. 48; *Matter of Lansing*, 182 N. Y. 238; *Matter of Langdon*, 153 N. Y. 6; *Commonwealth* v. *Wellford*, 114 Va. 372; *Hunt* v. *Wicht*, 174 Cal. 205; *Lacy* v. *Treasurer*, 152 Iowa 477; *Eury's Executors* v. *State*, 72 Ohio State 448; *Tozer* v. *Probate Court*, 102 Minn. 268; *Arenac County* v. *Iosco County*, 158 Mich. 344; *Commonwealth* v. *McCauley's Executors*, 166 Ky. 450; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251; *Succession of Stauffer*, 119 La. 66; *In re Collateral Inheritance Tax*, 88 Me. 587; *Carter* v. *Whitcomb*, 74 N. H. 482; *Re Spangler's Estate*, 281 Pa. 118.

The same principle was subsequently applied by this Court to the various gift tax cases in which the Treasury

Department had sought to impose the tax retroactively. (*McNeir* v. *Anderson*, 275 U. S. 577; *Blodgett* v. *Holden*, *supra*; *Untermyer* v. *Anderson*, 276 U. S. 440.)

Accordingly, the principle enunciated in *Nichols* v. *Coolidge* and in the gift tax cases is not unique and should not "be held applicable only to the particular facts in the cases as to which those opinions were rendered". (See Opinion of the Court of Claims herein, R. 22.) On the contrary, it is a principle which has been uniformly applied by this Court for at least the half-century last past wherever, under the label of an exercise of the taxing power, either Congress or the Legislature of a State has provided a rule so arbitrary and capricious, so wanting in a just and reasonable basis for classification, as to be in effect confiscatory or, as suggested in *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615, to amount to "spoliation under the guise of exerting the power to tax". It is, moreover, a principle which has been similarly enunciated in practically all cases in which the same question has been raised before State courts.

The Court of Claims in its opinion herein seeks to distinguish the present case from the Coolidge case on the ground that the transfer in the present case was made in contemplation of death. It said (R. 18, 19):

> "In the Coolidge case, *supra*, the transactions are said to be 'not testamentary in character', by which we understand the Court to mean that they were not made in contemplation of death as a part of a plan of distributing the estate of the grantor by conveyance instead of by will. * * *.
>
> "In the instant case, the maker of the transfer, as in practically all cases where a conveyance is made in contemplation of death, was using the conveyance to dispose of or distribute his property instead of

> a will. * * * In its effect it differed but little from disposition by will. * * * What reason can be given why the estate of the man who transfers a part of his property in contemplation of death should not pay the same tax as the one who transfers it by will?"

It is difficult to understand what the Court of Claims meant by saying that the transfer was used in the place of a will. The donor did have a will disposing of his property upon his death and the appellants herein are the duly qualified executors under that will. The effect of the transfer made in December, 1916, was to remove the 2,713 shares of stock from the property and estate of the donor subject to disposition upon death under the terms of his will, to divest the donor immediately of the possession, use, control, and power of disposition of the property, and to vest the same immediately in the transferees. It is, perhaps, unfortunate that the Court of Claims saw fit to omit from their findings of fact the special circumstances surrounding the gift which clearly showed the reasons other than the anticipation of the possibility of death that prompted the transfer. Whatever these reasons may have been, however, it is clear from the facts that the transfer was not made because of the lack of a will or for the purpose of vesting title to the property at death as a substitute means in lieu of a will but was to bring about an immediate and irrevocable transfer of the property without awaiting death, whenever that might occur.

Contrary to the assertion of the Court of Claims, the transfer did differ materially in its effect from a disposition by will. The donees from the instant of the transfer had the full and unrestricted use and enjoyment of the property. The income arising therefrom, which, but for the

gift, would have accrued to the donor, was received and used by the donees for upwards of three years prior to the donor's death. Whatever enhancement in value accrued to the stock during this period increased the wealth of the donees, not of the donor. In effect, it differed from a disposition by will in every way in which any gift *inter vivos* differs from a distribution by will.

Another striking difference between the effect of a gift in contemplation of death and a disposition by will occurs upon the subsequent sale of the property by the donee. For example, under Section 113 of the 1928 Act, 45 Stat. 818 (and substantially like provisions of prior Acts) the basis for determining gain or loss on the sale of property acquired by will or intestacy is the value at the time of decedent's death (or in some cases at the time of later distribution to the taxpayer). The basis in respect of property acquired by gift, however, is either its value at the time of the gift or cost to the donor according to whether or not the gift was made prior to January 1st, 1921. The validity of the tax based on cost to the donor has been sustained by this Court (*Taft* v. *Bowers*, 278 U. S. 470; *Cooper* v. *United States*, 280 U. S. 409). The statute makes no distinction between gifts in contemplation of death and other gifts *inter vivos* and the Departmental Regulations (Reg. 74, Arts. 593, 595) provide that this basis applies to gifts and transfers in trust "whether or not made in contemplation of death or intended to take effect in possession or enjoyment at or after death".

Accordingly, if a gift in contemplation of death is made of property which cost the donor $25,000 and which is worth $25,000 at the time of the gift and the property has a value of $100,000 at the time of the donor's death, under the Government's contention herein the property would be in-

cluded as a part of the donor's estate and would be taxed at the $100,000 value. If the donee then sells the property at $100,000 he becomes subject to an income tax on a profit of $75,000. Had he received the same property by will and made a similar sale, the estate tax would then have been properly based on the $100,000 value but the donee would have been liable to no income tax on the subsequent sale.

The reason why the estate of a man who disposes of a part of his property by outright gift *inter vivos*, whether or not in contemplation of death, should not pay the same tax as the one who transfers his entire property by will is that the gift is not a transfer of property at death and therefore cannot properly be subjected to death duties, and the results and effect of the two methods of disposition are dissimilar in every material respect, including the income tax liability upon a subsequent sale of the property transferred.

The transfer here under consideration was not in any way testamentary in character. The outstanding characteristics of a testamentary disposition of property are that the donor not only retains until death the full title, use, possession, and enjoyment of the interest involved, but also retains until death the full and unrestricted right to modify, alter, or completely revoke the disposition provided for. None of these attributes of a testamentary disposition of property existed in connection with the transfer here involved. At least some of them, and in many instances all of them, do exist in the case of a transfer intended to take effect at or after death. Accordingly, if a gift made prior to the enactment of the applicable taxing act and intended to take effect in possession or enjoyment at or after death

cannot be validly taxed thereunder, it follows, *a fortiori*, that an outright gift fully and irrevocably consummated prior to such enactment cannot be so taxed whether or not such gift was made in contemplation of death.

In the gift intended to take effect at or after death, possession or enjoyment or the right to modify or revoke or the right otherwise to control the property is retained by the donor and does not vest in the ultimate transferee until the donor's death. The complete fruition and accomplishment of the donor's ultimate purpose is postponed until his death. Death is, in respect of some one or more elements of the interest transferred, the "generating source" of the transfer. Even in *Nichols* v. *Coolidge*, the transferees did not receive the property in fee until the death of the survivor of the grantors nor could the ultimate recipients be determined until such death. (See *Coolidge* v. *Loring*, 235 Mass. 220; *Coolidge* v. *Nichols*, 4 Fed. (2nd) 112, 115.)

Such is not the case in respect of a gift, whether or not made in contemplation of death, which, as in the present case, has been irrevocably consummated prior to the adoption of the taxing statute and years prior to the death of the donor. In the present case, the donor did not retain even any of the rights or interests the retention of which this and other courts have held not to result in taxability, such as the reservation of life income (*May* v. *Heiner, Commissioner* v. *Northern Trust Co., McCaughn* v. *Carnill* and *Hodgkins* v. *Commissioner, supra*), or the right to alter or revoke with the consent of the trustee (*Farmers Loan and Trust Company* v. *Bowers*, 29 Fed. (2nd) 14; *Erskine* v. *White*, D. C. Mass. Dist. No. 4272, decided Oct. 1, 1930, not yet reported), or the right to revoke with the consent of the beneficiary (*Reinecke* v. *Northern Trust Co., supra*).

There was, in the present case, no tying up of property in trust nor postponement of the full and unrestricted use of the donee for the donor's life or for the life of others or by way of accumulation for any period whatsoever (See *Shukert* v. *Allen*, 273 U. S. 545). The transfer was an immediate transfer of the entire property complete, unqualified, unlimited, indefeasible, and irrevocable, made over two years prior to the adoption of the Act under which the tax is sought to be imposed and over three years prior to the date of the donor's death. The death of the donor, when it did occur, effected no change whatsoever in the right, title, and interest in and to the shares of stock involved or the possession, use, control, and enjoyment thereof. Death was in no sense a "generating source" of the transmission of the property or of the succession thereto or to any interest therein or attribute thereof.

The implication of the remarks of the Court of Claims above quoted is that a transfer in contemplation of death has a testamentary nature and bears a resemblance to a disposition by will lacking in the transfer intended to take effect in possession or enjoyment at or after death. As has been shown, however, the contrary is true. The transfer intended to take effect at or after death has many of the attributes of a testamentary disposition, all of which are wholly absent in the case of a transfer in contemplation of death. This court held in the *Coolidge* case that a transfer intended to take effect in possession or enjoyment at or after death, made prior to the enactment of the 1918 Act, cannot be validly taxed under Section 402(c) of that Act. It follows that no more, in fact, much less, can a transfer in contemplation of death similarly made be so taxed.

POINT III.

The retroactive application of Section 402(c) of the 1918 Act to transfers in contemplation of death made prior to the effective date of that Act cannot be supported as a necessary adjunct to the enforcement of the general provisions of the statute taxing the net estates of decedents.

Ever since *Knowlton* v. *Moore*, 178 U. S. 41, at least, if not prior thereto, it has been recognized that

> "the public contribution which death duties exact is predicated on the passing of property as the result of death".

As pointed out by this Court in *Reinecke* v. *Northern Trust Co., supra:*

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax."

A tax on transfers in contemplation of death cannot be supported as a gift tax because of its want of a proper basis for classification and of a reasonable relation to the subject. (See *Schlesinger* v. *Wisconsin*, 270 U. S. 230.) As a gift tax it is as discriminatory as would be a tax on gifts made by red-headed men or on gifts made on Wednesday. (See quotation from *Frew* v. *Bowers, infra*, p. 32.) It is also obvious that, in an outright gift of this nature, the property does not in fact pass as the result of death but as the result of a gift made *inter vivos*, frequently, as here, several years prior to death. Accordingly, it cannot be supported as a death duty. If the tax can be supported at all, therefore, it must be upon the theory that it is

"valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality might have been subject to doubt." (See dissenting opinion of Mr. Justice Brandeis in *Untermyer* v. *Anderson, supra,* p. 451.)

In *Nichols* v. *Coolidge, supra,* this Court said (p. 542):

> "Undoubtedly, Congress may require that property *subsequently* transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, *but the right is limited by the necessity.*"

The Court of Claims said (R. 20):

> "It is perfectly evident that if the owner of an estate, after he had reason to believe that death was nigh, could in contemplation thereof distribute his property by gift instead of by will, the means of avoiding the estate tax would be so apparent and easy, avoidance would become the rule and the payment of the tax the exception * * *. It ought also to be said in this connection that the provision in the statute which made it apply to prior transactions was undoubtedly intended to prevent evasion by making conveyances before the act could go into force. Such provisions have been held valid in tariff acts."

Are these suggestions of the lower court borne out by the facts? Are transfers in contemplation of death so prevalent as to constitute the rule rather than the exception? Is the menace of tax evasion so great as to require the retroactive taxation of gifts in contemplation of death, even at the expense of straining constitutional principles and requirements?

Eliminating gifts *causa mortis*, with which we are not here concerned, it would seem obvious that the very nature of a gift in contemplation of death would effectually prevent its adoption as a means of tax avoidance. In the Court below, the defendant quoted from *Mahan* v. *Plank*, 289 Fed. 722:

> "To hold and enjoy one's property, and yet to provide for its passage to children, unburdened by inheritance tax or administration expense, has been the task and worry of many an accumulator during the later years of his life."

This undoubtedly is true, but the defendant and the Court of Claims overlooked the compelling force of the first clause quoted: *"To hold and enjoy one's property"*. The gift which takes effect at or after death enables the donor to hold and enjoy his property. The outright gift in contemplation of death prevents it. However strong the desire to minimize taxes may be, the desire to retain the full use and enjoyment of one's property during life is a much stronger force. Even apart from retroactive application, therefore, it does not appear reasonable to assume that gifts in contemplation of death, if wholly tax-free, would produce any substantial loss of revenue to the Government. That this is true is shown by the relatively few cases involving contemplation of death which have been before the courts, notwithstanding the astuteness of the Tax Department in alleging contemplation under any and all possible circumstances. It is further shown by the still smaller number of cases in which the courts have found that the transfers involved actually were made in contemplation of death. An example of the comparative extent of the use of gifts in contemplation of death and gifts intended to take effect at

or after death may be found in the further fact that, while numerous cases involving the latter class of gifts have been decided by this Court, this is the first case directly involving the issue of contemplation of death, not only since the passage of the 1916 Act but, so far as counsel for petitioners can find, under any of the various federal succession and transfer tax statutes, which appears to have reached this Court.

But the proposition goes much further than this. It is unnecessary for petitioners to claim that transfers in contemplation of death made subsequent to the passage of the Act under which the tax is sought to be imposed may not validly be subjected to the excise. What the Government here claims and what petitioners deny is that the necessity exists for a retroactive application of the tax. Gifts in contemplation of death are made in the anticipation that death is nigh. Accordingly, each property owner who desires to make a transfer in contemplation of death in order to avoid the tax must first wait until he has reasonable ground for believing that he is about to die. Otherwise, the transfer would not be in contemplation of death within the legal significance of those words and would not be taxable in any event. But if he makes the transfer and dies while the Act in force at the time the gift was made is still in effect, the transfer will be taxable. Accordingly, in order to accomplish his purpose of tax evasion, he must find a means, after effecting the transfer, to postpone the date of his death for several years and until such time as Congress in its discretion may see fit to repeal the existing law and to enact a new statute imposing additional and more burdensome tax rates. Obviously, no such power exists. It is apparent that the tax cannot be thus avoided and, since "the right is limited by the necessity", no basis exists for upholding

the retroactive application of the tax to transfers made in contemplation of death as a necessary adjunct to the enforcement of the general excise on property passing as the result of death.

As Mr. Justice McReynolds said in *Schlesinger* v. *Wisconsin, supra,* p. 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."

The Court of Claims, as above indicated, stated that "Such provisions have been held valid in tariff acts". No cases were cited in support of this proposition and a careful examination of the various tariff acts and cases arising thereunder has failed to reveal any cases of this nature. On the contrary, in at least two cases in which this question has arisen (*United States* v. *Burr,* 159 U. S. 78; *United States* v. *American Sugar Refining Co.,* 202 U. S. 563) this Court has refused to construe tariff laws as having been intended to be given retrospective application. It is possible that the Court may have had in mind such cases as *United States* v. *Heinszen,* 206 U. S. 370, and *Rafferty* v. *Smith Bell & Co.,* 257 U. S. 226, involving Philippine tariffs, but in those cases a tariff was in existence at the time the duties were collected and the decisions were rested on the principle of ratification of the acts of an agent. In the Heinszen case the Court specifically pointed out that to

treat the act of Congress ratifying the collection of the tariff as "retrospective legislation enacting a tariff." was misstating the very nature of the act and proved the fallacy of the taxpayer's contention.

POINT IV.

In any event, the provisions of the Act fixing the measure of the tax on transfers under Section 402(c) are so arbitrary and capricious as to violate the Fifth Amendment.

The tax imposed upon the transfer here in question is complained of not merely because of the retroactive application of the 1918 Act, but because the tax thus retroactively applied was imposed at a rate approximately two and one-half times as great as that provided by the 1916 Act in effect at the time the gift was made, and, moreover, was imposed upon the property not at its value at the time of the gift nor at any time when it was in the possession of the decedent, but at its value at the time of his death, over three years after he had parted with all interest therein. The tax is thus imposed upon one entity, the estate of the decedent, in respect of property belonging to an entirely different entity, the donee of the antecedent gift, and on the basis of a value bearing no relation to any value of the property at any time while owned by the decedent. As far back as *Knowlton* v. *Moore, supra,* this Court intimated (p. 77) that there might be a doubt as to the validity of taxation

> "by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the

property of another, thus bringing about the profound inequality which we have noticed."

In fact, a half a century ago, and prior to *Knowlton* v. *Moore*, this Court said, in *Hartman* v. *Greenhow*, 102 U. S. 672, 684:

> "Surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

This phase of the case was considered by the Circuit Court of Appeals in *Frew* v. *Bowers*, 12 Fed. (2nd) 625; certiorari dismissed 275 U. S. 578. In that case, Circuit Judge Hough said (p. 628):

> "How, in any reasonable usage of the word, Mr. Nash can be said to have an 'interest' in 1922 in what he never owned, because he 'transferred' in 1910 the capital so skillfully increased by others, we are quite unable to perceive.
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> • • • • • •
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> "An excise tax on the transfer of property occurring by reason of the death of A, payable only out of A's estate, and graduated by the size of that estate, is augmented by treating as part of A's property the property of another, three-fifths of which Mr. Nash never owned, and two-fifths of which he gave to that other 12 years before his death.
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> • • • • • •
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> "But if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done; *i. e.*, use the property of A as a measure for the tax to be laid upon B. Thus stated, it would seem impossible

to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is.

"If that description be accepted, while there is no classification of taxpayers, the tax itself is 'arbitrary and capricious'. *Barclay* v. *Edwards*, 267 U. S. 442, 450, 45 Sup. Ct. 135, 348 (69 L. Ed. 703). Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but *it is a palpable effort to tax something other than the transfer*. In this case the effort is to tax in 1922 in respect of something untaxable in 1910."

In the same decision, Circuit Judge Hand, concurring, said (p. 630):

"In substance it imposes a tax upon the settlor, measured by the value of property at his death, over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fifty-fold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. *Such a law is far more ca-*

pricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

This decision was cited with approval in *Nichols* v. *Coolidge, supra* (p. 542), and certiorari was dismissed by stipulation after the Supreme Court had decided the Coolidge case.

In *Bradley* v. *Nichols,* 13 Fed. (2nd) 857, 859, affirmed 27 Fed. (2nd) 47, District Judge Morton said:

> "To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true."

In *Hill* v. *Nichols,* 18 Fed. (2nd) 139, 140, District Judge Brewster said:

> "I am willing to accept the argument of the Government that Congress, having the power to tax an estate of a deceased person, may measure the tax by any standard which bears a reasonable relation to the subject and is not arbitrary. * * * But I cannot go with it to the extent of regarding as reasonable a measure which includes the value at time of his death of property of which the decedent has completely divested himself years before the Act imposing the tax was enacted."

The same point was commented upon by this Court in *Nichols* v. *Coolidge* (p. 542) as follows:

> "Property of small value transferred before death may have become immensely valuable, and the

> estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves Ten dollars, both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died."

That this feature was an important factor in the determination of the Coolidge case is indicated in the remarks of this Court distinguishing that case in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270:

> "But we are here concerned * * *, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, *and to do so at the probably appreciated value which the gift now bears* * * *. The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; *and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.*"

As indicated in the above quotation from the Coolidge case, the estate pays or does not pay a tax on the transfer, depending on whether the transfer is of a part only or of all the assets. In *Levy* v. *Wardell, supra*, p. 544, this Court said:

> "She left no property or estate or assets whatever, and consequently, there was no estate to administer, nor any estate upon which any tax could be levied."

It is obvious that this basis of valuation must frequently produce results so unusual as to border on the grotesque. The same person may receive identical gifts at the same time from two different donors, both of whom die at the same time, one penniless, the other leaving a substantial estate. The latter estate is taxed at the full value of the gift at the time of death; the former escapes the tax because there are no funds in the estate out of which to collect. In both cases the donors parted with identical interests and in both the donees received identical benefits; yet one gift is taxed, the other not.

Again, a donor makes gifts at the same time of similar nature and identical value to two donees. The one donee, by his diligence and industry in developing the property, succeeds in increasing its value many fold. The other allows his gift to waste until it becomes worthless. The donor's estate at the time of his death is taxed in respect of the one property at a value several times that attributable to it at the time of the gift, but is not taxed at all in respect of the other. The tax thus depends, not upon the value of the property transferred, but upon the wholly adventitious and unrelated circumstance of the care given the property by the donee, a matter over which the donor has no control.

Again, a donor transfers securities worth $1,000,000, which the donee immediately sells for $1,000,000, but at the time of the donor's subsequent death the particular securities have a value of five or ten million dollars. Since the tax is upon the value at the time of death of the particular property which was transferred, the donor's estate will be taxed on the basis of the five or ten million dollar value, notwithstanding the fact that the donor did not transfer nor the donee receive or enjoy such value. The arbitrary and capricious nature of the statute would be equally mani-

fest if the value of the securities transferred, instead of increasing five or tenfold, were to diminish to the point of worthlessness. The tax borne by the estate depends not upon the value of the property transferred nor upon the quantum of benefit received by the transferee, but upon extraneous circumstances bearing no reasonable relation to the transfer and over which neither donor nor donee have any control whatsoever.

The Act does not operate in such manner as to tax a transfer in contemplation of death, made in lieu of a will, in the same manner as the property transferred would have been taxed had the same disposition been made by will. It operates in such manner as to prevent the transferor from making the testamentary disposition that he desires of his remaining property. In fact, it may easily so operate as to make it wholly impossible for him to provide for his family after his death. The gift in contemplation of death may be of property then regarded as of comparatively slight value but which by reason of some unexpected development, such as the discovery of oil or mineral ore, attains such value that the tax more than consumes the remaining estate, thereby rendering it wholly impossible for the donor to provide for his widow and children.

Similarly, a father, anticipating death in the near future, desires to divide his estate equally between his son, who is about to start in business for himself, and a daughter, who is wholly dependent on the father for support. He makes an immediate transfer of a half interest in the property to his son to enable him to go into business; the other half he wills to his daughter. At the time of the father's death, the son's business has so prospered that the tax based on its then value consumes the greater part or all of the estate which was willed to the dependent daughter.

The father's purpose is thus wholly defeated. His entire estate at the time of the gift may have been less than the statutory exemption, yet the daughter's half is consumed in paying a tax to the Government not on property transferred by the father at death or at any other time but on accretions to value developed by the transferee, who escapes the tax entirely.

It might, perhaps, be argued that this Court erred in the statements made by it in *Levy* v. *Wardell* and *Nichols* v. *Coolidge,* above referred to, to the effect that there is no tax if there is no estate out of which it may be collected, since Section 409 of the statute imposes a contingent liability upon the donee in case the tax is not paid by the executor. The validity of this provision is open to serious doubt (see *Lewellyn* v. *Frick,* 268 U. S. 238), but, if it be upheld, the Act represents a still further paradox. In the supposititious case above suggested, where the transferee immediately sells the property and it subsequently increases materially in value, assume that the transferor dies bankrupt. The transferee then becomes liable for the tax on the property at a value greatly in excess of that which he received and wholly as the result of the bankruptcy of the transferor, that is to say, "A" is taxed on the value of property owned by "B" because of the bankruptcy of "C". It would be difficult to conjure out of one's imagination a tax more arbitrary and capricious, a tax producing more gross and patent inequality, a tax depending more upon the whim and sport of fortune and less upon the nature of the thing taxed than this.

The Court of Claims (R. 21) brushed aside this feature of the Act with the comment that it applied equally to transfers made after the passage of the applicable Act. It would appear more accurate to say that the same objection

applies, although in lesser degree, to a transfer made subsequent to the passage of the Act. It may well be that the basis prescribed is so arbitrary and so wanting in due relation between the measure of the tax and the thing taxed as to be invalid in any case. That, however, is a question which it is not necessary here to decide. In this same connection, Circuit Judge Hand, in *Frew* v. *Bowers, supra* (p. 630), said:

> "As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand."

POINT V.

The retroactive application of Section 402(c) amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution.

A tax imposed upon the estate of a decedent, measured by the value of property which he has long since disposed of, is a direct tax and cannot properly be considered an excise upon the transfer of property by death, where the transfer, as in the case at bar, was made prior to the passage of the act purporting to impose the tax.

This point is well brought out in an article on "Retroactive Excise Taxation" in Volume 37 of the Harvard Law Review from which we quote the following:

> "The very nature of an excise, however,—a tax upon the privilege of doing a certain act or receiving a certain transfer, makes it necessary that such a tax be confined to prospective operation. If the taxpayer has already completed the transaction, a tax upon the privilege of consummating it is a con-

> tradiction in terms. The taxpayer has no choice in the matter. He has made an executed sale or received a vested conveyance upon which there was no restraint for the purposes of revenue. If he is later taxed on this account, it is an unavoidable and absolute demand. He has not the opportunity of exercising the privilege and thereby incurring the tax or refusing to exercise the privilege and thereby avoiding the tax. It becomes in effect a direct assessment upon the property itself 'simply because of its ownership', and as such is unconstitutional if unapportioned among the states" * * * 37 *Harvard Law Review,* 694, 695.

To the same effect, see 26 *Columbia Law Review* 852, 858. The writer there states:

> "Since the transfer of the *res* has been completed before the passage of the tax statute no privilege must be exercised as a condition to the imposition of the tax. The tax is upon a particular class of *res,* defined by its connection with some past event. Hence the tax should be invalidated on the ground that it is direct."

The outstanding feature of a direct tax as distinguished from duties, imposts, and excises is that of an "absolute and unavoidable demand". See *Thomas* v. *United States,* 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 151-152; *South Carolina* v. *United States,* 39 Ct. Cls. 257; affd. 199 U. S. 437. The direct tax is obligatory. The demand is absolute and unavoidable and there is no means of escaping its incidence. An excise, on the other hand, is voluntary. The person who would otherwise be subject to the tax may escape it by not doing the thing subject to the excise. This absolute and unavoidable demand clearly exists when an attempt is made to tax a transfer effected

prior to the adoption of the taxing statute. The transfer has been accomplished beyond recall. The donor is powerless to avoid the tax. The tax is therefore direct. At the time of the enactment of the statute, the property has passed beyond the control of the donor; there is no event or transaction occurring, no right or privilege exercised by the donor after the passage of the Act in any manner connected with the property upon which an excise can be predicated; since there is no event or privilege to be taxed, the only tax that can be laid is a direct tax upon the property or the person. This was clearly expressed by Mr. Justice McKenna in *Levy* v. *Wardell, supra* (pp. 544-545):

> "The Act of Congress, therefore, should not be construed to be retroactive, and, if so construed * * * would not be, besides, a transfer tax or an indirect tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

When, as is clear, the tax in respect of property transferred by the decedent prior to the passage of the taxing act would constitute a direct tax, the attempt to sustain its legality by calling it an excise tax upon the transmission of the decedent's estate upon his later death must fail. The determination of the nature of the tax "must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized". *Kansas City Railway* v. *Kansas,* 240 U. S. 227, 231.

Thus, in *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, the Kentucky statute imposed an "annual license tax" on persons engaged "in the business of owning and stor-

ing whisky", the tax being fifty cents a gallon on whisky withdrawn from bond or transferred in bond to another state. This Court held that, notwithstanding the language of the Act, this was not an excise but was a direct tax on the property itself. Mr. Justice Brandeis, speaking for the Court, said (pp. 292, 294):

> "The name by which the tax is described is, of course, immaterial. Its character must be determined by its incidents, and obviously it has none of the ordinary incidents of an occupation tax * * *. The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. To levy a tax by reason of ownership of property is to tax the property. It cannot be made an occupation or license tax by calling it so."

For the same reasons it has been held that "a tax on the sale of an article, imported only for sale, is a tax on the article itself" and "a tax on the occupation of an importer is, in like manner, a tax on importation" (*Brown* v. *Maryland*, 12 Wheat. 419, 25 U. S. 554, 562); that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing" (*Almy* v. *California*, 24 How. 169, 174); that a "license tax exacted * * * from dealers in goods * * * must be regarded as a tax upon such goods themselves" (*Welton* v. *Missouri*, 91 U. S. 275, 279); that "a tax on sales made by an auctioneer is a tax on the goods sold" (*Cook* v. *Pennsylvania*, 97 U. S. 566, 573); that "a tax on * * * charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports" (*U. S.* v. *Hvosléf*, 237 U. S. 1, 17); and that a stamp tax on policies of marine insurance on exports is a tax on the exports

themselves (*Thames & Mersey Ins. Co.* v. *U. S.*, 237 U. S. 19). In all these and other similar cases the Supreme Court has looked through the form of the tax, purporting to be an indirect tax, and has regarded the actual substance and accordingly has held the taxes to be direct. In answer to the argument advanced in *Brown* v. *Maryland, supra,* that the tax was not on the article sold but was an occupation tax on the seller, the Court said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance."

POINT VI.

The applicability of the principles enunciated by this Court in *Nichols* v. *Coolidge* is not affected by the fact that the transfer in the present case was made subsequent to the passage of the 1916 Act.

Although this Court has repeatedly sustained the retroactive application of direct taxes within reasonable limits, it has in every instance in which the issue has been squarely raised uniformly refused to uphold the application of an excise to an event or transaction fully consummated prior to the adoption of the taxing Act. (*Nichols* v. *Coolidge, supra; Frew* v. *Bowers, supra; Levy* v. *Wardell, supra;* and the several Gift Tax cases above cited. See also *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, and the several Estate Tax cases above cited in which the Act was so construed as to avoid the stigma of retroactivity.) The argument of the Government that these cases should be distinguished on the ground that there the transfers in question were not made in contemplation of death has already been commented upon. The Government seeks to distinguish *Nichols* v. *Coolidge* on the further ground that

the transfer there sought to be taxed was made in 1907, at a time when there was no federal statute taxing transfers of this nature, whereas the transfer in the instant case; although made prior to the adoption of the 1918 Act under which the tax was assessed, was, nevertheless, made in 1916 at a time when there was in effect a somewhat similar statute subjecting transfers in contemplation of death to tax but at a much lower rate. It is submitted that this does not constitute a valid basis for distinguishing the cases and refusing to apply the rule laid down in *Nichols* v. *Coolidge* to the facts here presented. This Court, in the Coolidge case, as has above been stated, suggested that property *subsequently* transferred in contemplation of death might be treated as constituting a part of the taxable estate. Again (p. 543) the Court stated that in so far as Section 402(c) of the statute (viz., the 1918 Act) required that property transferred prior to *its* passage be included in the taxable estate merely because the conveyance was intended to take effect in possession or enjoyment at or after death, it was in violation of the due process clause of the Constitution. "Its" obviously refers to the 1918 Act and not to the prior 1916 Act.

In the present case, the Act of September 8th, 1916, in effect at the time of the gift, imposed a tax at rates beginning at 1% on the amount of the net estate in excess of $50,000 and running up to 10% on the amount in excess of $5,000,000. This was amended by the Act of March 3rd, 1917, which increased the rates to amounts from 1½% on the lowest bracket up to 15% on the highest. It was further supplemented by the Act of October 3rd, 1917, which left the 1916 Act as amended unimpaired but provided for additional taxes at rates of from 1% on the amount of the net estate not in excess of $50,000 up to 10% on the amount

in excess of $10,000,000. All three of these Acts were repealed by Section 1400 of the 1918 Act, adopted February 24th, 1919, and in lieu thereof a new tax was imposed at rates beginning at 1% on the amount of the net estate not in excess of $50,000 and running up to 25% on the amount in excess of $10,000,000.

At the time of the gift, this nation was at peace with the world. Between that time and the time of the adoption of the Act under which the tax is here sought to be imposed, the United States had entered the World War, that war had been fought to a conclusion, and successive tax laws had been adopted for the purpose of enabling the Government to meet the tremendous war costs which not only had not been incurred, but, if anticipated at all, were considered only as remote possibilities at the time the transfer was made. Substantially all of the tax here at issue was assessed at the maximum 25% rate, a rate two and one-half times as great as that in effect at the time of the transfer. The earlier Act was a more or less normal peace-time measure. The later Acts, including the one under which the tax was assessed, were emergency war revenue measures.

In *Untermyer* v. *Anderson, supra,* the Court said (p. 445):

> "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

If a taxpayer cannot be expected to foresee the adoption of a bill actually pending in Congress, the terms of which are definitely known to him, how can he be expected to fore-

see the adoption of another and different bill to be submitted to Congress years later to meet an extraordinary and almost cataclysmic emergency which has arisen in the interim? How can it be said that the 10% tax in effect in 1916 furnished an "adequate warning" sufficient to justify the 25% tax imposed several years later? If the Act in effect at the time of making a transfer imposed a tax of 1%, would such Act give "adequate warning" so as to validate a tax of fifty or sixty per cent. under a subsequent statute? Is not the adoption of an Act substantially increasing the rate of tax just as much the adoption of a new and unforeseen law as the enactment of the original statute imposing the tax at the lower rate?

It is submitted that the 1918 Act with its increase in rates applicable to the property here in question of from 10% to 25% and with the various other changes and new features therein contained, was as much a new law as was the Act of September 8th, 1916.

> "The rate of taxation is an indispensable element in the assessment, as much so as the value on which it is to be laid. Without either no assessment can be made.
>
> Let us now go back to the Act of 1916 as amended. The sections of the original Act and of the amending Act which impose the tax each contains as a part thereof the schedules of rates to be applied to the net value of estates in ascertaining the amount of the tax, and declares that the tax imposed equals those percentages. No tax estimated on net value as a basis could be imposed without a rate, nor could an assessment be made if Congress had not fixed the rate,—directly, as it did, or indirectly. The declaration that a tax was imposed on the transfer of the net value of estates would have been meaningless, without a fixed or definitely as-

certainable rate. The fixing of the rates to be applied to the net estate was requisite to imposing the tax, an indispensable element in the imposition." (*Page* v. *Skinner,* 298 Fed. 731, 735; certiorari denied 266 U. S. 625.)

Furthermore, it is submitted that the repeal of the 1916 Act by Section 1400 of the 1918 Act leaves the earlier Act as thoroughly and completely effaced (except with respect to the phases particularly covered by saving clauses) as though it had never existed.

> "The general rule, supported by the best elementary writers is, that 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'" (*Ex Parte McCardle,* 7 Wall. 506, 514.)
>
> "The general rule is that powers derived wholly from a statute are extinguished by its repeal." (*Flanigan* v. *Sierra County,* 196 U. S. 553, 560.)
>
> "In keeping with this general doctrine the unqualified repeal of a tax act destroys, not only the remedy for the collection of the tax, but as well the liability for the tax, the right to the tax, the tax itself." (*Wilmington Trust Co.* v. *United States,* 28 Fed. (2nd) 205, 206.)

It is obvious that if Section 402(c) can be construed so as to apply to the case at bar, such construction must be based upon the specific clause "whether such transfer or trust is made or created before or after passage of this Act". Were that clause omitted from the Act, the transfer would not be taxable at all. It could not be taxed at the 10% rates imposed by the 1916 Act because that Act, together with the amendatory and supplemental statutes of 1917, had been fully repealed and, as will be later shown,

the saving clause of the repealer was not here applicable. It could not be taxed under the 1918 Act unless, by virtue of the provision above quoted, that Act can be construed with retroactive intendment as to past completed transactions. The issue of constitutionality, therefore, rests squarely upon the validity of a retroactive construction of the 1918 Act irrespective of any prior statutes, whether or not couched in similar phraseology.

POINT VII.

The saving clause contained in Section 1400(b) of the 1918 Act does not operate to impose a tax upon the transaction here in question.

Judge Graham, in his concurring opinion in the Court of Claims, makes the further point, the reasoning in connection with which is not altogether clear, that the tax imposed by the Act of 1916 effective at the time the gift was made, is somehow saved by Section 1400(b) of the 1918 Act, but in such manner as to be taxable at the 1918 rates instead of the 1916 rates (R. 24-25). It is difficult to follow the argument advanced by the Court of Claims in this regard. The provisions of the first sentence of Section 1400(b) of the 1918 Act pertain to remedies and save the right to assess and collect all taxes and penalties which had accrued under the Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, therein repealed. As respects estate taxes, these provisions applied only in respect of estates of decedents dying prior to the effective date of the 1918 Act, viz., February 24th, 1919, inasmuch as the tax accrues at the time of death. (*Page* v. *Skinner, supra*; *Flannery* v. *Willcuts*, 25 Fed. (2nd) 951; *Hanna* v. *United States*, 68 Ct.

Cls. 45, certiorari denied, 280 U. S. 612.) The proviso respecting Title I of the Revenue Act of 1916 pertains not to the sections here involved, as alleged by the Court of Claims (R. 25), but to income taxes. The second proviso, as above indicated, applies only to estates of decedents dying prior to the adoption of the 1918 Act. The second sentence of subdivision (b) operates solely to prevent a hiatus between the date of adoption of the repealer and the effective date of the tax imposed by the new Act in lieu of the one repealed where the Act provides for an effective date subsequent to the date of adoption of the Act as, for example, in the case of taxes on transportation and insurance under Title V, taxes on admissions and dues under Title VIII, special taxes under Title X and stamp taxes under Title XI.

It is obvious that any saving clause must operate to continue any tax liability under the old Act at the rates imposed by such Act and not at some different and higher rate. It could not "save" a 25% tax when the maximum rate under the old Act was 10%. But no claim is made by the Government that a tax in respect of the transfer here under consideration had accrued under the 1916 Act or should be paid at any rates other than those provided by the Revenue Act of 1918. The most that is claimed is that by virtue of the fact that the 1916 Act, in effect at the time of the gift, purported to tax transfers in contemplation of death, the Government acquired at the time of the transfer an "inchoate" right to tax the transfer under the retroactive provisions of Section 402(c) of the 1918 Act, subsequently adopted.

The Courts, however, have consistently held that vested rights only are saved under a repeal and that inchoate rights and imperfect obligations are destroyed. The effect

of a repeal upon inchoate rights was construed by this Court in *Hertz* v. *Woodman*, 218 U. S. 205, 216:

> "The question for solution must therefore turn upon the inquiry whether the tax in question had been imposed prior to the going into effect of the repealing act within the intent and effect of the saving clause just set out.
>
> There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute."

In *Flanigan* v. *Sierra County, supra*, this Court quoted (p. 560) from *Endlich on Statutory Interpretation* as follows:

> "The same rule applies to rights and remedies founded upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone."

This rule is stated in *Lewis's Sutherland on Statutory Construction* (2nd Ed.), Vol. I, §284, as follows:

> "A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a *vested* right. *It must be some-*

thing more than a mere expectation based upon an anticipated continuance of the existing law.''

In the present case, although the transferor may have thought at the time of making the gift that he was about to die, he did not actually die until years later. It is the Government's contention that an ''inchoate liability'' attached (R. 24) at the moment the transfer was made, which might be taxed under any subsequently enacted statute, irrespective of any intervening events and irrespective of the fact that the death of the transferor, when it did later occur, had no effect upon the transfer or upon the vesting of any interest or benefit in the property in the transferee.

But, as has been shown above, if any ''inchoate liability'' attached at the time of the transfer, it was extinguished by the repeal of the 1916 Act implied in the Act of March 3rd, 1917, and further expressly provided for in the 1918 Act. No tax had accrued under the 1916 Act and since Section 1400(b) of the 1918 Act operated to save accrued taxes only and thus saved estate taxes only in respect of estates of decedents dying prior to February 24th, 1919, no tax against the estate of this decedent was ''saved'' by that Section.

The tax upon the transfer now under consideration, however, cannot be supported except upon this wholly untenable theory. The tax is not upon any interest which passed from the decedent at his death. It is upon an interest transferred by him years prior to death and prior to the passage of the Act imposing the tax. If a tax is to be imposed under the Act adopted subsequent to the transfer it must be upon the theory that the transfer was inherently of such a nature that it might properly be subjected to a tax as a necessary adjunct to enforcing the general

provisions of an estate tax law and that there therefore arose at the time of the transfer an "inchoate liability" to any tax which Congress by subsequent legislation might see fit to impose thereon. It is obvious from the language of the Act that if this theory of the Government be correct and if the tax attaches at all, the Government is also correct in its contention that it attaches irrespective of any events which may have occurred between the time of the transfer and the time of the transferor's death. It would attach even if the transferee had reconveyed the property to the transferor either as a voluntary gift or by way of sale. This produces an anomalous result further illustrating the arbitrary, capricious, and confiscatory nature of the tax previously commented upon.

Assume, for example, a gift of certain securities worth $100,000. The value of the securities subsequently shrinks to $50,000 and the donee sells them to the donor at their then market value. The donor subsequently resells them for $25,000 and reinvests the proceeds in other property. At the time of the donor's death, the value of the securities which were the subject matter of the gift has increased to $200,000. Under the Government's construction of the Act, this $200,000 is included in the decedent's taxable estate as well as the property representing the reinvestment of the $25,000 representing the proceeds of the sale of the securities by the donor.

Or assume that the securities at the time of the gift had a purely nominal value. The donee subsequently voluntarily returns the securities as a gift while the value is still nominal and the donor sells them and dissipates the proceeds, later dying and leaving no assets. The securities by that time have acquired a value of several hundred thousand dollars and the donee, who has received no benefit

from the gift, is taxed under Section 409 of the Act on the basis of that value because of the "inchoate liability" arising out of the donor's frame of mind at the time of the making of the gift and notwithstanding the intervening events, including the retransfer by the donee. And this construction is necessary, according to the Government, in order to enforce the general provisions of the Act and, as asserted by the Court of Claims (R. 20) "makes for equality between taxpayers rather than inequality, which would otherwise exist"!

POINT VIII.

The repeal of the Revenue Acts of September 8th, 1916, March 3rd, 1917, and October 3rd, 1917, coupled with the enactment of the Act of February 24th, 1919, containing analogous taxing provisions, but at different rates, cannot be so construed as to relieve the later Act from the taint of retroactivity when applied to a transfer completed prior to its adoption.

The Court of Claims in its Opinion (R. 22) called attention to the contention of the Government that the repeal of the 1916 Act and the Acts amendatory and supplemental thereto by Section 1400 of the 1918 Act coupled with the simultaneous adoption of a new Act of the same general nature but with changed rates and various other new features added, should not be construed as amounting to a repeal of the old statutes but a continuation thereof with changes. The majority of the Court stated that the conclusions which they had reached made it unnecessary to consider this proposition. Judge Graham, however, to a large extent based his concurring opinion on this ground (R. 26-28). In support of this view he cited *Campbell* v. *California*,

200 U. S. 87; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Gulf, etc. Railway Co.* v. *Dennis*, 224 U. S. 503; *Wright* v. *Oakley*, 5 Met. 406, and *Bear Lake, etc. Co.* v. *Garland*, 164 U. S. 1.

It is true that in each of these cases the Court used language which, if entirely dissociated from the facts under consideration, might seem to lend color to the Government's contention in the instant case. An examination of the facts of the several cases, however, shows that in none of them was the decision even remotely applicable to the question here at issue.

Judge Graham mentioned the fact (R. 26) that "The legislation involved in the Campbell case was an inheritance tax law". The similarity of the two cases, however, begins and ends with that fact. In the Campbell case, the issue originally raised was the validity of varying exemptions granted to different classes of relatives under the California Inheritance Tax Law. Judgment on this point was rendered against the estate by the Supreme Court of California and an appeal was taken to the U. S. Supreme Court. While that appeal was pending, the State of California enacted a new law specifically repealing the Act in force at the time of decedent's death and under which the disputed taxes had been assessed. The new issue thereby raised before this Court was whether such a repeal without a saving clause as to taxes accrued under the prior Act had the effect of extinguishing such taxes and thus resulted in making the constitutional question originally raised a moot one. This Court held (p. 93) that the repeal did not have such an effect, that it was the duty of the Court to affirm the decree because of the vested right existing under the earlier Act, and that, as previously held by the Supreme Court of California in the *Estate of Stanford* v. *California*, 126 Cal. 112, the later Act, "in attempt-

ing to abrogate such vested right, was repugnant to specified provisions of the Constitution of California".

The later Act at issue in that case imposed different rates and granted different exemptions from those specified by the earlier Act. There was no attempt, however, to apply the amended provisions retroactively to the case under consideration. The decision went no further than to hold that a vested right to the tax prescribed by the earlier Act accrued to the State upon decedent's death and that the subsequent repeal of that Act while the case was pending before the Supreme Court did not operate to abrogate such vested right notwithstanding the fact that the repealer contained no express saving clause.

The decision in *Steamship Co.* v. *Joliffe, supra,* was to the same effect. In that case, the defendant in error had become entitled to statutory half pilotage fees under the California Act of 1861. Judgment therefore had been rendered in his favor by the State Court and an appeal from that judgment had been taken to this Court. As in the Campbell case, a new statute was enacted during the pendency of the appeal, the new Act containing in substance the same provisions as the earlier law but in terms expressly repealing it. This Court said:

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a *vested right* which stands independent of the statute."

Wright v. *Oakley, supra,* was an action on two bills of exchange which matured in 1826. They were then subject to a six-year statute of limitations so that action was barred

in 1832. Subsequently and in 1835, the Massachusetts statutes were amended and a provision was inserted in the statute of limitations excluding from the computation of time thereunder time during which the defendant was absent from and resided outside the state. Suit was brought in 1839 and if the provisions of the statute as amended could be applied to the situation there would have been no bar to the action. The amendatory statute contained no express repeal of the earlier Act, the repeal being solely one by implication applicable to such provisions of the earlier Act as might be repugnant to those of the later one professing to cover the entire subject. The Court said (p. 410):

> "Here we are inquiring what the Legislature intended by the use of language, *not repealing or professing to repeal the statute* but modifying and continuing it, with a general saving of all rights accruing or accrued, and not affecting any act done; and we are of the opinion, that the Legislature did not intend to take away any right, power or privilege of being protected, for the future, against actions then actually barred by the preexisting law."

Not only was the Act involved in this case one affecting procedure or remedy and not substantive rights, but it will be noted that, so far from holding that the parties were subject to the provisions of the later statute on the theory now advanced by the Government in the case at bar, that because of the "continuing" nature of the legislation the different liabilities provided by the subsequent statute may be imposed, the Court refused to apply the extended period of limitation under the amended Act and held that the right was barred by the earlier law.

Speaking of *Gulf, etc., Railway* v. *Dennis, supra,* Judge Graham in the Court below said (R. 27) that:

> "there was involved a statute containing a simultaneous repeal and reenactment of a prior statute".

As a matter of fact, in the Dennis case there was neither repeal nor reenactment and the language quoted by Judge Graham from the opinion of this Court in the Dennis case (p. 507) refers to the decision in *Steamship Co.* v. *Joliffe, supra.* In the Dennis case the statute provided for the inclusion of attorneys' fees in judgments for damages against railway companies. The Railroad appealed to this Court from a judgment which Dennis had obtained for $75 damages and $20 attorneys' fees. While the appeal was pending, the Supreme Court of Texas adjudged the statute invalid under the State Constitution and the issue was thus raised as to whether the intervening decision of the State Court rendered the Federal question a moot one. This Court said (p. 509):

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all sufficient ground for relieving it from the attorneys' fee, independently of the Federal question presented on the record; and for reasons before stated. We think it becomes our duty to vacate the judgment so that the State Court may apply the decision by awarding a new judgment in conformity therewith."

Neither in its facts nor in its decision did that case have any application whatsoever to the case at bar.

Bear Lake, etc., Company v. *Garland, supra,* was a suit for the enforcement of a mechanic's lien. The statute in

effect at the time the work was commenced provided that such liens must be filed within 60 days of completion of the contract and that proceedings to enforce them must be taken within 90 days after filing. The statute in effect when the work was completed provided that proceedings to enforce the lien must be commenced within one year from filing. The case decided nothing more than the point that the right to file the lien attached upon the completion of the work and that the time within which the lien must be filed and proceedings thereunder commenced was limited by the Act then in effect and not by the Act in effect at the time the work was begun.

In none of these cases was there any attempt to impose under an amended statute, whether or not such statute contained an express repealing clause of the earlier Act, any greater obligation, liability, or penalty than provided by the earlier law. There is nothing in them nor, it is submitted, in any decision of this Court in any manner lending color to the theory that the repeal under Section 1400 of the 1918 Act of the tax with the maximum 10% bracket here applicable imposed by the 1916 Act, together with the simultaneous enactment of the new law providing for a 25% tax in respect of the same item, can be construed as a mere "continuation" of the prior law.

Nor is the situation as simple as stated by Judge Graham in his opinion below (R. 25):

> "According to the construction presented by the petitioners, we would have this situation, namely, that had the donor died the day before the Act of 1918 became effective there would have been no question of liability, but if he had died the day after the passage of that Act there would be no liability, because the Act of 1916 had been repealed and the liability released thereby."

This statement is not wholly accurate. The 1916 Act in effect at the time of the transfer was prospective only in its application (*Schwab* v. *Doyle; supra; Union Trust Co.* v. *Wardell,* 258 U. S. 537; *Levy* v. *Wardell, supra; Knox* v. *McElligott,* 258 U. S. 546). The amendatory Act of March 3rd, 1917, and the supplemental Act of October 3rd, 1917, likewise contained no language of retroactive import and therefore should similarly be construed as prospective only. Furthermore, since a fixed rate is an indispensable element of an Act imposing a tax (see *Page* v. *Skinner, supra*) and since the provisions of the Act of March 3rd, 1917, imposing new and higher rates of tax are repugnant to the lower rate provisions of the 1916 Act, the later Act repealed the earlier to the extent of such repugnancy as completely as if it had contained an express repealing clause.

> "When there are two acts on the same subject • • • if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *United States* v. *Tynen,* 11 Wall. 88, 92.

(See also *Pana* v. *Bowler,* 107 U. S. 529; *Murphy* v. *Utter,* 186 U. S. 95.) Therefore, if the decedent had died after March 3rd, 1917, the transfer in question would not have been taxable because the rates imposed by the 1916 Act had been repealed and the rates imposed by the Act of March 3rd, 1917, admittedly, were prospective only in their application. Even if the amendment of March 3rd, 1917, could be held not to operate as a repeal of the rates imposed by the 1916 Act, the transfer, because of the lack of retroactive intent in the 1917 amendment, would have been taxable in the event of death after March 3rd, 1917, only at the 10% rate provided by the earlier law and not at the 15% rate provided by the later Act.

The Act of October 3rd, 1917, did not provide a substitute rate by way of amendment to the earlier Acts, but imposed an entirely separate tax "in addition to the tax imposed by" the 1916 Act as amended. The rate of such additional tax applicable to the transfer now under consideration substantially in its entirety was 10%. But, as has been stated, this Act, like those of September 8th, 1916, and March 3rd, 1917, contained no retroactive provisions, and therefore under the decision in *Shwab* v. *Doyle, supra,* could not be applied in the present case. Accordingly, if the decedent had died the day before the Act of 1918 became effective, the transfer either would not have been taxable at all, or, at the most, would have been taxable at the 10% rate provided by the 1916 Act, notwithstanding the fact that there were at that time in effect Acts imposing a tax in the aggregate amount of 25%.

The Government claims that the effect of the 1918 Act, repealing all three of the prior Acts and adopting a new statute providing tax brackets differing from all the prior statutes and embodying numerous new provisions, including the retroactive phraseology of Section 402(c), was to assemble the Act of September 8th, 1916, previously repealed by implication, the Act of March 3rd, 1917, which never applied to the transfer at issue, and the Act of October 3rd, 1917, which likewise could by no possibility have applied to such transfer, and to "continue" them into the new law so as to impose upon the transfer a tax equivalent to the aggregate amount provided under the three prior and inapplicable Acts. And the Court of Claims was of the opinion (R. 26) that "this construction imposed no hardship upon the estate"!

Conclusion.

In conclusion, it is submitted that the gift of 2,713 shares of the capital stock of Minot Mills, Inc. made by the decedent to his three children in December, 1916, did not constitute a part of his estate at the time of his death March 5th, 1920, and was not taxable under the provisions of the Revenue Act of 1918; that Section 402(c) of the Revenue Act of 1918 does not purport to tax such gift and, if so construed as to impose a tax, is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and further amounts to an unapportioned direct tax forbidden by Sections 2 and 9 of Article I of the Constitution. It is accordingly submitted that the judgment of the Court of Claims should be reversed and judgment should be entered against the United States of America in the sum of $812,162.42, together with interest thereon from the 10th day of March, 1926, and costs.

Respectfully submitted,

D. A. Embury,
Attorney for Petitioners,
Office & Post Office Address:
63 Wall Street,
Borough of Manhattan,
City of New York.

Hugo Kohlmann,
Curtis, Mallet-Prevost, Colt & Mosle,
Of Counsel.

Appendix.

Act of September 8, 1916.
(39 Stat. 777-778)

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be [fol. 3] determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginning at 1% on the amount of the net estate not in excess of $50,000. and running up to 10% on the amount in excess of $5,000,000.)

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Act of March 3, 1917.
(39 Stat. 1002)

Sec. 300. That Section 201, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes" approved September eighth, nineteen hundred and sixteen, be, and the same is hereby amended to read as follows:

> "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:"
>
> (Here follows a table showing the rates of tax beginning at 1½% on the amount of the net estate not in excess of $50,000. and running up to 15% on the amount in excess of $5,000,000.)

Sec. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Act of October 3, 1917.
(40 Stat. 324-325)

Sec. 900. That in addition to the tax imposed by section two hundred and one of the Act entitled "An Act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the

value of such net estate to be determined as provided in Title II of such Act of September eighth, nineteen hundred and sixteen):

(Here follows a table showing the rates of tax beginning at ½ of 1% on the amount of the net estate not in excess of $50,000. and running up to 10% on the amount in excess of $10,000,000.)

Act of February 24, 1919.

(Revenue Act of 1918)

(40 Stat. 1096-1101, 1149)

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginginning at 1% on the amount of the net estate not in excess of $50,000. and running up to 25% of the amount in excess of $10,000,000.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money

or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title:

Sec. 409. * * *

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 1400. (a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

* * * * * *

Title II (called "Estate Tax");

* * * * * *

(2) The following parts of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the

extensions of fortifications, and for other purposes," approved March 3, 1917;

Title III (called "Estate Tax");

* * * * * * *

(3) The following titles of the Revenue Act of 1917:

* * * * * * *

Title IX (called "War Estate Tax");

* * * * * * *

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, and except that the unexpended balance of any appropriation heretofore made and now available for the administration of any such part of an Act shall be available for the administration of this Act or the corresponding provision thereof: *Provided,* that, except as otherwise provided in this act, no taxes shall be collected under Title I of the Revenue Act of 1916, as amended by the Revenue Act of 1917, or Title I or II of the Revenue Act of 1917, in respect to any period after December 31, 1917; *Provided, further,* that the assessment and collection of all estate taxes and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

* * * * * * *

FILE COPY

JAN 28 1931

Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, Deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONERS' REPLY BRIEF.

D. A. EMBURY,
Attorney for Petitioners,
63 Wall Street,
New York, N. Y.

HUGO KOHLMANN,
CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
A. Petitioners' right to raise construction issue	1
B. Lower court decisions in contemplation cases	2
C. Retroactive excise taxes	3
D. Taxability under 1916 act	4

TABLE OF AUTHORITIES.

CASES CITED.

Alice State Bank *v.* Houston Pasture Co., 247 U. S. 240	1
Billings *v.* United States, 232 U. S. 261	3
Commercial Credit Co. *v.* United States, 276 U. S. 226	1
Fourth National Bank *v.* Francklyn, 120 U. S. 747	2
Grant Bros. *v.* United States, 232 U. S. 647	2
Guaranty Trust Co. *v.* Koehler, 195 Fed. 669	2
Hecht *v.* Malley, 265 U. S. 144	3
Latham *v.* Commissioner, 16 B. T. A. 48	3
Loetscher *v.* Commissioner, 14 B. T. A. 228	3
Luscomb *v.* Commissioner, 30 Fed. (2nd) 818	3
Magruder *v.* Drury, 235 U. S. 106	2
Phillips *v.* Gnichtel, 27 Fed. (2nd) 662	3
Pollock *v.* Farmers Loan & Trust Co., 158 U. S. 601	4
Rengstorff *v.* McLaughlin, 21 Fed. (2nd) 177	3
Schoenheit *v.* Commissioner, 44 Fed. (2nd) 476	3
Shwab *v.* Doyle, 269 Fed. 321	3
Stockdale *v.* Insurance Companies, 20 Wall. 323	3
Towne *v.* Eisner, 245 U. S. 418	2
United States *v.* Railroad Co., 17 Wall. 322	4
Watts *v.* Waddle, 6 Pet. 389	2
Weems *v.* United States, 217 U. S. 349	2

STATUTES CITED.

PAGE

Revenue Act of February 24, 1919:

Sec. 401 6
Secs. 500, 800, 904, 905, 906, 907, 1000, 1001, 1100 5
Sec. 1400 ..... 4, 6
Sec. 1409 5

Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Last Will and Testament of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF.

A. Petitioners' Right to Raise Construction Issue.

The United States challenges petitioners' right to raise before this Court the question of construction of the statute and cites as authority for its contention *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, and *Commercial Credit Co. v. United States*, 276 U. S. 226. In both these cases the new questions raised on appeal were entirely different in their nature from the questions presented in the applications for certiorari and did not naturally arise as necessary incidents to the consideration of the issues presented in the applications for the writs. It is also to be noted that in both cases the Court decided in favor of the petitioners on the grounds presented in the applications for the writs so that consideration of additional issues was wholly unnecessary.

In the present case, however, the question of construction is one which naturally and in fact necessarily arises as a preliminary to consideration of the constitutional issue. Petitioners complain that the statute as construed and administered by the Treasury Department is unconstitutional. In considering whether or not the statute "in so far as it purports to tax" the transfer here involved is invalid (R. 1, 9, 13), the first question inevitably presented is whether there was error by the Treasury Department in construing the statute to apply to the transfer and by the Court of Claims in sustaining this construction (R. 17).

The argument advanced by the United States undoubtedly represents the general rule where the alleged errors do not involve any issues either "of a fundamental or jurisdictional character" (*Grant Brothers* v. *United States*, 232 U. S. 647, 660; *Magruder* v. *Drury*, 235 U. S. 106, 113). However, there is no rule of court or principle of law preventing the Court from considering new issues. (See *Watts* v. *Waddle*, 6 Pet. 389, 402; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751.) It is a matter within the sound discretion of the Court and is not controlled by precedent (*Weems* v. *United States*, 217 U. S. 349, 362), and ordinarily such issues will be considered and decided "where they naturally arise and are pertinent to the questions at issue and to further proceedings in the trial court" (*Guaranty Trust Co.* v. *Koehler*, 195 Fed. 669, 671. See also *Towne* v. *Eisner*, 245 U. S. 418, 425, 426).

B. Lower Court Decisions in Contemplation Cases.

In addition to the present case, there have been four decisions of the lower courts including the United States Board of Tax Appeals sustaining the constitutionality of federal Acts taxing gifts in contemplation of death.

(*Schwab* v. *Doyle*, 269 Fed. 321; *Schoenheit* v. *Commissioner*, 44 Fed. (2nd) 476; *Loetscher* v. *Commissioner*, 14 B. T. A. 228 and *Latham* v. *Commissioner*, 16 B. T. A. 48.)

In *Schwab* v. *Doyle, supra*, the validity of the Act was sustained by the Circuit Court of Appeals on the ground (p. 327) that the retention of a right of revocation in connection with a transfer was of no consequence in considering the question of its taxability. Not only was that case reversed on other grounds by this Court, but the error of the ground upon which the validity of the Act was sustained by the Circuit Court of Appeals is shown by numerous later decisions of this Court.

In the *Schoenheit, Loetscher* and *Latham* cases, *supra*, the transfers were all made when the 1918 Act was in effect and the decedents died after the passage of the 1921 Act which imposed a tax at identical rates, bracket for bracket, with those imposed by the 1918 Act, whereas in the case at bar the 1918 Act in effect at the time of decedent's death imposed a tax two and one-half times as great as the 1916 Act in effect at the time of the transfer.

In the additional three cases cited by the United States on this point (*Rengstorff* v. *McLaughlin*, 21 Fed. (2nd) 177; *Phillips* v. *Gnichtel*, 27 Fed. (2nd) 662 and *Luscomb* v. *Commissioner*, 30 Fed. (2nd) 818), neither the construction of the Act nor its constitutionality was considered.

C. Retroactive Excise Taxes.

The cases cited by the United States respecting retroactive excise taxes (*Stockdale* v. *The Insurance Companies*, 20 Wall. 323; *Billings* v. *United States*, 232 U. S. 261; and *Hecht* v. *Malley*, 265 U. S. 144) do not contravene the petitioners' contention that this Court has never sustained an excise upon a fully completed past transaction or event.

In the *Stockdale* case, *supra*, four members of the Court held that the Act of July 14, 1870, was retroactive and valid; two members concurred but held that the Act of 1870 did not impose a new tax retroactively but merely provided when the tax imposed by the earlier Act should cease to be effective; and three members dissented. Furthermore, the tax there involved was an income tax (see *United States* v. *Railroad Co.*, 17 Wall. 322, 326) and therefore a direct tax, so that entire decision is in effect overruled by *Pollock* v. *Farmers Loan and Trust Co.*, 158 U. S. 601.

In the *Billings* case, *supra*, the tax was an annual tax upon the use of foreign built boats. It was enacted and went into effect *during* the year in respect of which it was first made applicable. There is no reason why an annual tax upon the continuous exercise of some privilege cannot be applied in the same manner and at the same rate for the exercise of that privilege during a part of the year as for its exercise during an entire year, and the *Billings* case decided nothing beyond this point.

The same principles control the decision in *Hecht* v. *Malley, supra*, which involved an annual tax on the privilege of doing business similarly adopted *during* the year as to which it was applied. Moreover, as the Court pointed out (p. 163), the question of constitutionality was not specifically considered.

None of these cases involves a tax upon a past completed event.

D. Taxability Under 1916 Act.

The United States now for the first time argues that if the provisions of the 1918 Act are inapplicable, the transfer should be taxed under the 1916 Act, and relies on the provision of Section 1400 (b) of the 1918 Act:

> "In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect *under the provisions of this Act.*" (Italics ours.)

This argument, however, is without merit. Section 1400 (a) of the 1918 Act repealed the several taxes imposed by the 1916 and 1917 Acts "subject to the limitations provided in subdivision (b)". The purpose of the provision of subdivision (b) above quoted was to make the repeal of the various taxes under the prior Acts effective each at the instant that the corresponding provisions of the new Act severally became effective.

Section 1409 of the 1918 Act provided:

> "That unless otherwise herein specially provided, this Act shall take effect on the day following its passage."

A different date was "specially provided" in respect of the taxes imposed by Sections 500, 800, 904, 905, 906, 907, 1000, 1001, and 1100, and except for the provisions of Section 1400 (b) above quoted, there would have been no tax, for example, on admissions and dues from February 24, 1919, until April 1, 1919, the effective date of Title VIII of the 1918 Act as provided by Section 800. The purpose of the above quoted provision of Section 1400 (b) was to prevent any such hiatus, and not to continue or revive a prior Act where the corresponding provisions of the 1918 Act, irrespective of any question of constitutionality, "took effect under the provisions of that Act" immediately upon its passage.

The Estate Tax provisions under Title IV of the 1918 Act took "effect under the provisions of the Act" immediately. Section 401 explicitly prescribed that the rates therein stated were to be imposed "upon the transfer of the net estate of every decedent dying after the passage of this Act". Accordingly, the above quoted provisions of Section 1400 (b) are wholly inapplicable.

Respectfully submitted,

D. A. EMBURY,
Attorney for Petitioner.

HUGO KOHLMANN,
CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

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No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1930

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND Harold A. Hatch, Executors of the Estate of Seth M. Milliken, Deceased, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

QUESTION PRESENTED

Whether the value of property gratuitously transferred in contemplation of death, prior to the enactment of the Revenue Act of 1918 but after the enactment of the Revenue Act of 1916, may constitutionally be included, under Section 402 (c) of the Revenue Act of 1918, in the gross estate of the transferror who died on March 5, 1920.

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provides in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> (Here follows a table of percentages.)
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in con-

templation of death within the meaning of this title; * * *

The Revenue Act of 1918 (Act of February 24, 1919 c. 18, 40 Stat. 1057, 1096, 1097) provides in part:

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act whether a resident or nonresident of the United States:

(Here follows a table of percentages, materially higher than those in the Revenue Act of 1916.)

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale for a fair consideration in

money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

STATEMENT

In December, 1916, Seth M. Milliken gave certain stock to his three children. At that time the Revenue Act of 1916 was in force, and if the death had then occurred the gift would have been taxable under that Act at a rate of approximately ten per cent. The petitioners have waived any right to contend that the transfer was not in fact made in contemplation of death. (R. 15.)

On March 5, 1920, the transferror died. At that time the Revenue Act of 1918 was in effect. The 1918 Act repeated substantially the same language as the 1916 Act, except that the 1918 Act was expressly retroactive; and the rates imposed by the 1918 Act were substantially higher than those under the 1916 Act.

The petitioners, executors of the transferror's estate, did not include in the decedent's gross estate the value of this stock. (R. 15.) The petitioners contended that the gift could not be taxed under the 1916 Act because that Act had been repealed before the transferror's death; they also contended that the gift could not be taxed under the 1918 Act,

because that Act could not constitutionally be applied to a gift which was made before its passage. The Commissioner held that the gift was taxable under the Revenue Act of 1918, valued the stock at the date of death at $3,308,720.54, and redetermined the tax due from the petitioners after adding this sum to the gross estate (R. 15). The petitioners paid the tax so determined and, after their claim for refund was rejected, brought this suit in the Court of Claims. The Court of Claims dismissed their petition.

We submit that the decision of the Court of Claims was correct, and there are no decisions in conflict. But the question presented is an important one, and is involved in numerous cases now pending in the courts and before the Treasury Department. Consequently, we do not oppose the petition.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
FRED K. DYAR,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
Attorneys.

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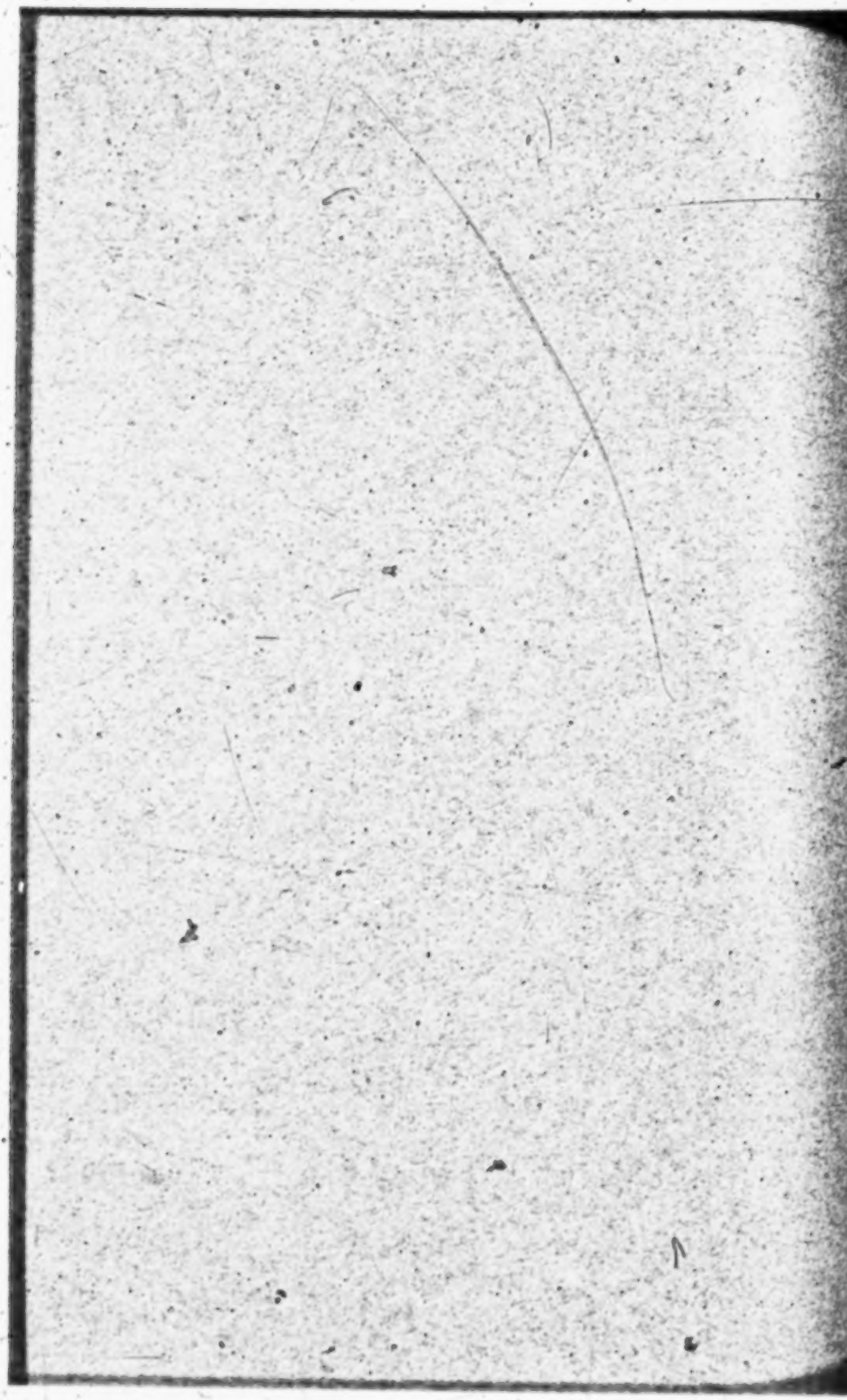

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BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	3
Argument:	
I. Congress intended by section 402 (c) of the revenue act of 1918 to tax transfers such as that in the instant case	4
II. A tax may constitutionally be imposed on gifts made in contemplation of death	6
III. That the transfer antedated the enactment of the taxing statute does not render the tax confiscatory in this case	9
IV. If the provisions of the revenue act of 1918 can not constitutionally be applied to this transfer, it was in any event taxable under the revenue act of 1916 and the petitioners are not entitled to the refund sought	14
Conclusion	16
Appendix: Statutes involved	17

CITATIONS

Cases:

Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240	6
Bear Lake Irrigation Co. v. *Garland*, 164 U. S. 1	10
Billings v. *United States*, 232 U. S. 261	10
Blodgett v. *Holden*, 275 U. S. 142	11
Brushaber v. *Union Pacific R. R. Co.*, 240 U. S. 1	10
Campbell v. *California*, 200 U. S. 87	10
Chase National Bank v. *United States*, 278 U. S. 327	5, 7
Commercial Credit Co. v. *United States*, 276 U. S. 226	6
Cooper v. *United States*, 280 U. S. 409	10
Corliss v. *Bowers*, 281 U. S. 376	9
Fawcus Machine Co. v. *United States*, No. 40, October Term, 1930, decided January 5, 1931	10
Hecht v. *Malley*, 265 U. S. 144	10, 13
Latham v. *Commissioner*, 16 B. T. A. 48	12
Luscomb v. *Commissioner*, 30 F. (2d) 818	8

Cases—Continued	Page
Loetscher et al. v. *Commissioner*, 14 B. T. A. 228	12
May v. *Heiner*, 281 U. S. 238	5
Nichols v. *Coolidge*, 274 U. S. 531	9, 11, 12
Phillips v. *Gnichtel*, 27 F. (2d) 662, certiorari denied, 278 U. S. 636	8
Rengstorff v. *McLaughlin*, 21 F. (2d) 177	8, 12
Reinecke v. *Northern Trust Co.*, 278 U. S. 339	5, 8
Reinecke v. *Spaulding*, 280 U. S. 227	4
Schlesinger v. *Wisconsin*, 270 U. S. 230	8
Schoenheit v. *Lucas*, 44 F. (2d) 476	8, 12
Shwab v. *Doyle*, 269 Fed. 321, reversed, 258 U. S. 529	8, 12
Spangler's Estate, 281 Pa. 118	5
Stockdale v. *The Insurance Companies*, 20 Wall. 323	10
Taft v. *Bowers*, 278 U. S. 470	9
Tyler v. *United States*, 281 U. S. 497	9
Untermyer v. *Anderson*, 276 U. S. 440	11
Wickwire v. *Reinecke*, 275 U. S. 101	4
Statutes:	
Revenue act of 1916 (act of September 8, 1916) c. 463, 39 Stat. 756, 777—	
Section 201	17
Section 202 (b)	10, 15, 17–18
Revenue act of 1918 (act of February 24, 1919) c. 18, 40 Stat. 1057, 1096, 1097—	
Section 401	18
Section 402 (c)	3, 5, 6, 10, 18–19
Section 1400 (a) (1) (2) (3) (b)	19–20

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 16) is reported in 69 C. Cls. 231 and 38 F. (2d) 381.

JURISDICTION

The judgment of the Court of Claims was entered February 17, 1930. (R. 29.) The petition for a writ of certiorari was filed April 19, 1930, and the writ was granted October 13, 1930. (R. 30, 31.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the value of property gratuitously transferred in contemplation of death, prior to the enactment of the Revenue Act of 1918 but after the enactment of the Revenue Act of 1916, may constitutionally be included in the gross estate of the transferor who died on March 5, 1920, and taxed at the rates imposed by either of the Acts.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 17–20.

STATEMENT

In December, 1916, while the Revenue Act of 1916 was in force, Seth M. Milliken gave certain stock to his three children. (R. 15.) The Commissioner of Internal Revenue determined that this transfer was made in contemplation of death, and the petitioners have waived any right to assert that it was not so made. (R. 15.) The transferor died on March 5, 1920, after the enactment of the Revenue Act of 1918. (R. 15.)

The petitioners, executors of his estate, did not include the value of this stock in the decedent's gross estate in their Federal estate tax return. (R. 15.) The Commissioner of Internal Revenue assessed an additional tax, of which $812,165.42 resulted from the inclusion in the gross estate of this stock at its value at the time of the decedent's death. (R. 15.) This was done pursuant to the

provisions of Section 402 (c) of the Revenue Act of 1918 on the ground that the transfer was a gift made by the decedent in contemplation of death. (R. 15.)

The petitioners paid the additional tax and in due time filed a claim for refund of $812,165.42, the amount of the tax on the transfer of the stock. (R. 15, 16.) This claim was rejected by the Commissioner and this suit brought in the Court of Claims. That court dismissed the petition. (R. 16.)

SUMMARY OF ARGUMENT

I. Section 402 (c) of the Revenue Act of 1918 expressly taxes the transfer in the instant case. The language of the statute leaves no doubt but that Congress intended to tax a transfer in contemplation of death, whether the transfer was made before or after the passage of the Act. The petitioners' argument as to the construction of this section was not raised in the court below and is not open for argument in this Court.

II. The due process clause of the Fifth Amendment does not invalidate the application of Section 402 of the Revenue Act of 1918 to the transfer in the instant case. The transfer was in contemplation of death. The tax, if levied upon a transfer made after the date of the enactment of the statute, is constitutional. The tax is upon the testamentary disposition of the decedent's property. A gift in contemplation of death is a part of this disposition.

III. The fact that the transfer was made before the enactment of the statute does not render it arbitrary. The statute was a continuance of similar provisions in the Revenue Act of 1916 which was in force when the transfer was made. No tax was placed upon an act nontaxable when done. That the transferor could not calculate the exact rate of the tax when he made the gift does not make the tax unconstitutional.

IV. In any case, the property transferred is taxable at the lower rate prescribed by the Revenue Act of 1916. Congress intended the estate tax provisions of the 1916 Act to remain in force in every case until the provisions of the 1918 Act applied to the estate in that case.

ARGUMENT

I

CONGRESS INTENDED BY SECTION 402 (c) OF THE REVENUE ACT OF 1918 TO TAX TRANSFERS SUCH AS THAT IN THE INSTANT CASE

In the instant case the Commissioner included in the gross estate certain stock which he found had been transferred as a gift in contemplation of death. (R. 15.) The burden is consequently on the taxpayer to show that the Commissioner's determination that the gift was in contemplation of death was not correct. See *Wickwire* v. *Reinecke*, 275 U. S. 101; *Reinecke* v. *Spaulding*, 280 U. S. 227. The petitioners have not met this burden, for they "have waived any right to assert

that the transfer * * * was not as a matter of fact a transfer by the decedent in contemplation of death." (R. 15.)

By Section 402 (c) of the Revenue Act of 1918 (*infra*, p. 19), there is included in the gross estate and thus made subject to the estate tax any interest in property

> of which the decedent has at any time made a transfer * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer * * * is made * * * before or after the passage of this Act) * * *.

The petitioners contend that this language does not include the transfer in the instant case. They read Section 402 (c) as taxing transfers in contemplation of death *only* if the transfers are also intended to take effect in possession or enjoyment at or after death. The chief authority cited for this construction is *Spangler's Estate*, 281 Pa. 118. But this case does not support the petitioners' contention because the taxing statute under the applicable provision of the Pennsylvania Constitution could apply only to a transfer of property passing at the time of death. The other cases cited by the petitioners (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Chase National Bank* v. *United States*, 278 U. S. 327; *May* v. *Heiner*, 281 U. S. 238) did not involve a gift in contemplation of death, and the question of taxability depended upon

whether there had been a transfer to take effect upon death. Under the construction urged by the petitioners the phrase "in contemplation of" in Section 402 (c) is entirely superfluous and could be omitted. We submit that this phrase is not mere repetition but was placed in the statute by Congress avowedly and with a meaning distinct from that of the language following it.

Moreover, the petitioners are not in a position to urge this argument. At page 3 of their brief on the merits, the question is included in the assignments of error. But they did not raise the question in the Court of Claims nor in their petition for certiorari. The assignments of error in the petition for certiorari (R. 5) suggest no such position. This Court will not consider a question which was not presented to the court below nor assigned as error in the petition for certiorari. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240; *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

II

A TAX MAY CONSTITUTIONALLY BE IMPOSED ON GIFTS MADE IN CONTEMPLATION OF DEATH

Under Section 402 of the Revenue Act of 1918 (*infra*, p. 18), there is included in the value of the gross estate on which the estate tax is computed the value at the date of death of property transferred before death but in contemplation of death or intended to take effect at or after death. Many

of the petitioners' arguments question the constitutionality of this statute even as applied to a transfer in contemplation of death made after the passage of the taxing Act. We believe that this Court has indicated that the tax, so applied, is valid, but because of the lack of a decision directly in point we discuss the question briefly.

Elderly men frequently make substantial gifts with death and the ultimate disposition of their property in view. If the transfer is of a testamentary character, that is, if it is similar to that which the donor normally would have made by will, and differing from a transfer by will only in its irrevocable character, it falls within the meaning of the phrase, "made in contemplation of death." The principal purpose of Congress in using this language was to tax gifts or transfers which normally would be made by will or by the laws of succession but which are made irrevocably *inter vivos* with intention to avoid estate taxes.

The petitioners contend that a tax on such a transfer is unconstitutional under the Fifth Amendment, especially when the base upon which the tax is computed is the value of the transferred property, not at the date of the gift, but at the date of the death of the donor. The fact most stressed by the taxpayers in the instant case is that the basis of the tax, the value of the property at the date of death, bears no relation to the value of any property owned by the decedent at his death. But in *Chase National Bank* v. *United States*, 278 U. S.

327, and *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, the same provisions in the Revenue Act of 1921 were declared constitutional and nonconfiscatory as applied to proceeds of life insurance and trusts created to take effect upon death. Death is the final cause of the tax; Congress attempts to tax equally all testamentary dispositions, and chooses the date of death as that for valuation purposes. Only by such a means may the burden of estate taxation be distributed without discrimination. The tax on the transfer may be greater or less than a tax which Congress may choose to place upon a similar gift *inter vivos* not in contemplation of death.

The validity of a tax on gifts in contemplation of death has been uniformly upheld by the lower Federal courts. *Luscomb* v. *Commissioner*, 30 F. (2d) 818 (C. C. A. 2d); *Phillips* v. *Gnichtel*, 27 F. (2d) 662 (C. C. A. 3d), certiorari denied, 278 U. S. 636; *Schoenheit* v. *Lucas*, 44 F. (2d) 476, 488 (C. C. A. 4th); *Shwab* v. *Doyle*, 269 Fed. 321 (C. C. A. 6th), reversed on another ground, 258 U. S. 345; *Rengstorff* v. *McLaughlin*, 21 F. (2) 177 (N. D. Cal.). This Court has clearly indicated its view that such a tax is constitutional. In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, holding that the State estate tax was unconstitutional in so far as it contained a nonrebuttable presumption that all material transfers made within six years prior to death were made in contemplation of death, this Court said (p. 239):

> No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

This is, of course, equally applicable to the limits placed by the Fifth Amendment on the Federal taxing power. In *Nichols* v. *Coolidge*, 274 U. S. 531, at 542, this Court said:

> Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

In support of the provision in question, the Government relies upon the broad ground that it is an integral part of an entire taxing scheme, and it is a necessary and appropriate measure to enforce that scheme and prevent evasion of the tax. Cf. *Tyler* v. *United States*, 281 U. S. 497, 505; *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Taft* v. *Bowers*, 278 U. S. 470, 482.

III

THAT THE TRANSFER ANTEDATED THE ENACTMENT OF THE TAXING STATUTE DOES NOT RENDER THE TAX CONFISCATORY IN THIS CASE

In the instant case the gift in contemplation of death was made in December, 1916. (R. 15.) The statute under which the tax was levied, the Revenue

Act of 1918, was enacted on February 24, 1919. The transferor died on March 5, 1920. (R. 15.) The petitioners contend that on these facts the statute applies retroactively in placing a tax on this transfer, and is for that reason so arbitrary and confiscatory as to be invalid.

In considering this contention the fact that the gift was made in December, 1916, when the provisions of the Revenue Act of 1916 were in force, must be emphasized. Section 402 (c) of the 1918 Act (except for its parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act") is an exact reenactment of Section 202 (b) of the 1916 Act. (*infra*, p. 17). Such repeal and simultaneous reenactment is, as a matter of statutory construction, equivalent to a continuance of the legislation expressed in the Revenue Act of 1916. See *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1; *Campbell* v. *California*, 200 U. S. 87. See also *Fawcus Machine Co.* v. *United States*, No. 40, October term, 1930, decided January 5, 1931.

The statute is retroactive in form. But mere retroactivity in a taxing act does not render it unconstitutional, either in cases of direct taxation (*Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Cooper* v. *United States*, 280 U. S. 409) or in cases, like the present, of indirect and excise taxation, *Stockdale* v. *The Insurance Companies*, 20 Wall. 323; *Billings* v. *United States*, 232 U. S. 261; *Hecht* v. *Malley*, 265 U. S. 144.

The retroactive application of the gift tax provisions of the Revenue Act of 1924 was held invalid in *Untermyer* v. *Anderson,* 276 U. S. 440. The basis of this decision was stated in *Blodgett* v. *Holden,* 275 U. S. 142, 147:

> It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

This reasoning is inapplicable to the instant case. At the time of this transfer in contemplation of death, the donor had reason to expect that the gift would be taxed. He was disposing finally of a material part of his property by a transfer testamentary in character—transferring it during his lifetime instead of by will. Under statutes then existing it was required to be included as part of his gross estate and was subject to a Federal estate tax. A tax, so anticipated, can scarcely be considered unreasonable or confiscatory on the authority of the gift tax cases. No new or unexpected tax is imposed upon an act nontaxable when done.

In support of their contention the petitioners rely on *Nichols* v. *Coolidge,* 274 U. S. 531. But there the transfers were not in contemplation of death; they were not testamentary dispositions of the decedent's property.

The validity of the estate tax statute, as applied to a gift in contemplation of death made prior to

the enactment of the Revenue Act under which the tax is levied, has been upheld by decisions in several of the lower Federal courts in addition to the court below. In *Schoenheit* v. *Lucas,* 44 F. (2d) 476, 488 (C. C. A. 4th), it appeared that the decedent had made gifts in contemplation of death in 1920 and 1921, prior to the effective date of the Revenue Act of 1921, and that his death occurred in 1922, subsequent to the passage of that Act. The court held that the gifts might validly be included in the decedent's gross estate and made subject to the estate tax imposed by the Revenue Act of 1921. *Nichols* v. *Coolidge,* 274 U. S. 531, *supra,* was distinguished on the ground that the gifts were testamentary in nature, and were made with full notice that the property transferred was likely to be included in the decedent's estate at the time of his death for the purposes of taxation. In *Shwab* v. *Doyle,* 269 Fed. 321 (C. C. A. 6th), the provisions of the 1916 estate tax act were construed to be retroactive, and, as so construed, were held constitutional. This Court reversed the decision upon the point of construction, 258 U. S. 529. In *Rengstorff* v. *McLaughlin,* 21 F. (2d) 177 (N. D. Cal.) it appeared that the decedent made a transfer in 1912 in contemplation of death and died in 1919 after the enactment of the Revenue Act of 1918. It was held that the gift was subject to the estate tax levied by the 1918 Act. *Loetscher* v. *Commissioner,* 14 B. T. A. 228, and *Latham* v.

Commissioner, 16 B. T. A. 48, are examples of the decisions of the Board of Tax Appeals in accord with the decision below in the instant case. There are no decisions to the contrary.

The petitioners stress the point that the rates of taxation in the 1918 Act were considerably higher than those in the 1916 Act. This is pertinent only in demonstrating that at the time of the transfer the donor could not have computed the tax to be levied on that transfer, and so was not given the opportunity of weighing the advisability of making the gift in the light of the exact amount of the tax which was to be placed upon it. But in no case can the donor of a gift in contemplation of death compute the tax in advance. His gross estate may double between that date and the date of his death, so that even if the same taxing statute is in force his estate tax may, under the graduated rates prescribed by the statute, be at a higher rate than he expected.

Moreover, in a very similar case, this point has been considered by this Court and the constitutionality of the tax upheld. In *Hecht* v. *Malley,* 265 U. S. 144, associations known as "Massachusetts Trusts" were held not subject to the tax imposed by the special corporation excise-tax provisions in the Revenue Act of 1916. But such associations were expressly taxed under the similar provisions in the 1918 Act. This Court held that taxes unlawfully collected under the 1916 Act could be retained

by the United States as part payment of taxes retroactively assessed for the same period under the provisions of the 1918 Act. This 1918 tax was, like that in the instant case, an excise tax and was retroactive in that its rates were higher than those in the similar provisions of the 1916 Act which it superseded. Every objection urged by the petitioners in the instant case applies equally to the tax upheld in the *Hecht case*. There this Court said (p. 164):

> In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States.

IV

IF THE PROVISIONS OF THE REVENUE ACT OF 1918 CAN NOT CONSTITUTIONALLY BE APPLIED TO THIS TRANSFER, IT WAS IN ANY EVENT TAXABLE UNDER THE REVENUE ACT OF 1916 AND THE PETITIONERS ARE NOT ENTITLED TO THE REFUND SOUGHT

The applicable provisions of the 1916 and 1918 Revenue Acts are identical except for the clause in the later Act, "whether such transfer or trust is made or created before or after the passage of this Act," and with the further exception that the rates of the tax imposed by the 1918 Act are higher than those under the 1916 Act.

By Section 1400 of the 1918 Act (*infra*, pp. 19–20) the applicable provisions of all the earlier statutes were repealed, but it was provided that—

> Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * *. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

We submit that the intent of Congress is unmistakably expressed that Section 202 (b) of the 1916 Act should remain in force until Section 402 (c) of the 1918 Act took effect. If the latter section is unconstitutional in its application to gifts made in contemplation of death prior to its passage, it never took effect so far as this property involved in the instant case is concerned. The gift was taxable under the earlier statute, and by the terms of the 1918 Act the earlier statute remains in effect if the 1918 Act does not apply. Even if the 1918 Act should be found to be invalid, the petitioners are entitled only to the excess of the tax at the 1918 rates over the tax at the 1916 rates.[1]

---

[1] The amendments of Section 202 (b) under the 1917 Acts were not expressly retroactive and under *Shwab* v. *Doyle*, *supra*, have no application to this transfer in December, 1916.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
FRED K. DYAR,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
Attorneys.

JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provides in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be

deemed to have been made in contemplation of death within the meaning of this title; * * *

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, 1149, 1150) provides in part:

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act whether a resident or nonresident of the United States:

[Here follows a table of percentages, materially higher than those in the Revenue Act of 1916.]

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or

distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SEC. 1400. (a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

* * * * *

Title II (called "Estate Tax");

* * * * *

(2) The following parts of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917:

Title III (called "Estate Tax");

Section 402 (called "Returns of Dividends").

(3) The following titles of the Revenue Act of 1917:

* * * * *

Title IX (called "War Estate Tax");

* * * * *

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * * : *Provided further*, That the assessment and collection of all estate taxes, and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled "An Act to provide increased revenue to defray the

expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

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Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, Executors of the Estate of Seth M. Milliken, Deceased,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Court of Claims.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD, AS *AMICI CURIAE,* AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY, AND OTHERS.

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae,
43 Exchange Place,
New York City, New York.

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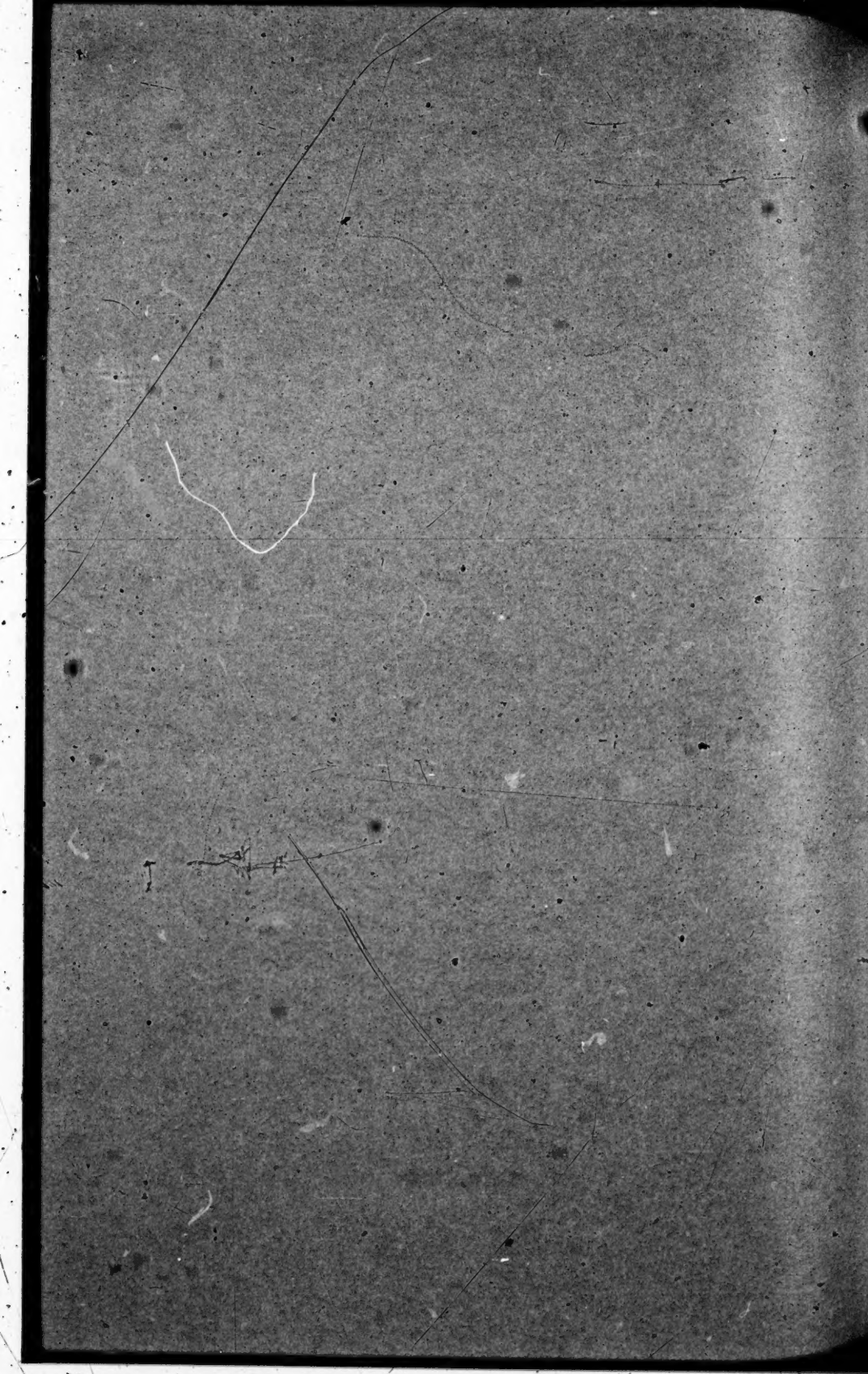

SUBJECT INDEX.

	PAGE
MOTION FOR LEAVE TO FILE BRIEF	1
REFERENCE TO FACTS	2
BRIEF RESUMÉ OF FACTS IN CASES REPRESENTED BY AMICI CURIAE	2
STATEMENT OF THE ISSUES	3
POINT I. May a transfer made during the pendency of the tax law with stated graduated rates of tax be subject to an excise tax under a subsequently enacted law at greatly increased graduated rates of tax?	3
POINT II. May an irrevocable transfer made in contemplation of death (whether made before or after the passage of this act) be subject to the Federal Estate Tax Act of 1918 (effective February 24th, 1919)?	8
CONCLUSION	36

TABLE OF CASES CITED.

	PAGE
Barclay & Co. *v.* Edwards, 267 U. S. 442	26
Barstow, Matter of, 230 App. Div. (N. Y.) 371	4
Billings *v.* U. S., 232 U. S. 261	24
Brady *v.* Ham, C. C. A. 1st Circuit, decided Nov. 26, 1930, not yet reported	34
Bromley *v.* McCaughn, 280 U. S. 124	25, 31
Bullen *v.* Wisconsin, 240 U. S. 625	29
Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1	5
Carroll *v.* Greenwich Insurance Co., 199 U. S. 401	26
Chambers *v.* Lamb, 186 Cal. 261, 199 Pac. 33	30
Chase National Bank *v.* U. S., 278 U. S. 327	12, 19, 32
Child Labor Tax Case, 259 U. S. 20	25, 26
Commissioner *v.* Northern Trust Co., 41 Fed. (2d) 732	33
Craig, Matter of, 97 App. Div. 289, Aff'd 181 N. Y. 551	4
Crooks *v.* Harrelson, et al., decided December 4, 1930, not yet reported	10
Eisner *v.* Macomber, 252 U. S. 189	24
Erskine *v.* White, 43 Fed. (2d) 765	34
Evans *v.* Gore, 253 U. S. 245	26, 27
Fairbank *v.* U. S., 181 U. S. 283	24, 26, 27
Farmers' Loan & Trust Co. *v.* Bowers, 29 Fed. (2d) 14	34
Flint *v.* Stone Tracy Co., 220 U. S. 107	7
Forbes Boat Line *v.* Board of Comm'rs, 258 U. S. 338	6
Frew *v.* Bowers, 12 Fed. (2d) 625	4, 6, 7, 14, 27, 28

PAGE

Hill *v.* Nichols, 18 Fed. (2d) 139 34
Hill *v.* Wallace, 259 U. S. 44 ..... 25, 26
Hilton *v.* Commissioner, 21 B. T. A. 3 34
Hodges, Matter of, 215 N. Y. 447, 449 30
Hodgkins *v.* Comm'r, 44 Fed. (2d) 43 33
Houston Estate, 276 Pa. St. 330 4

Knowlton *v.* Moore, 178 U. S. 41 ..... 17, 22, 27

Lansing, Matter of, 182 N. Y. 238 4

McCaughn *v.* Carnill, 43 Fed. (2d) 69 34
McCray *v.* U. S., 195 U. S. 27 25
May *v.* Heiner, 281 U. S. 238 ..... 21, 32, 33, 35
Morsman *v.* Comm'r., C. C. A. 8th Circuit, decided November 1930, not yet reported 34

Nichols *v.* Bradley, 13 Fed. (2d) 857, aff'd. C. C. A. 27 Fed. (2d) 47 24
Nichols *v.* Coolidge, 274 U. S. 531 ..... 4, 6, 7, 14, 18, 22, 27, 35, 36
Nicol *v.* Ames, 173 U. S. 509 ..... 7, 24

Page *v.* Skinner, 298 Fed. 731 cert. denied 266 U. S. 625 6
Patton *v.* Brady, 184 U. S. 608 ..... 5, 25
Pell, Matter of, 171 N. Y. 48 4
Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601 ..... 24, 26

Reinecke *v.* Northern Trust Co., 278 U. S. 339 ..... 5, 10, 20, 21, 32

Saltonstall *v.* Saltonstall, 276 U. S. 260 5
Schlesinger *v.* Wisconsin, 270 U. S. 230 ..... 23, 27, 29, 36
Schmidlapp, Matter of, 236 N. Y. 278 5

PAGE

Schwab *v.* Doyle, 258 U. S. 529 6
State Tax Commission *v.* Robinson's Ex'c'r (Ky.) 28 S. W. (2d) 491 23
Stockdale *v.* Insurance Companies, 20 Wall. 323... 5

Thomas *v.* U. S., 192 U. S. 363 ..... 7, 24
Trusler *v.* Crooks, 269 U. S. 475 ..... 25, 26
Tyler *v.* U. S., 281 U. S. 497 ..... 13, 21, 22

Ullman *v.* Commissioner, 20 B. T. A. 782 34
Untermyer *v.* Anderson, 276 U. S. 440..... 4, 6, 7, 8, 27, 36

Webber, Matter of, 151 App. Div. (N. Y.) 539.... 30
Wheeler *v.* Commissioner, 20 B. T. A. 695 34

TABLE OF REGULATIONS AND TREASURY DECISIONS CITED

Reg. 37, Art. 23 9
Reg. 70, Art. 27 34
T. D. 4296, I. R. B. IX-32-4744 (p. 3) 34

Supreme Court of the United States,

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, Executors of the Estate of Seth M. Milliken, Deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:—

The undersigned, as counsel for the City Bank Farmers Trust Company, as executor and as Trustee, and as counsel for others, respectfully move this Honourable Court for leave to file the accompanying brief in this case as *amici curiae.*

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
as *Amici Curiae,*
Counsel for City Bank Farmers Trust Company, and for others.

Supreme Court of the United States,

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, Executors of the Estate of Seth M. Milliken, Deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of the City Bank Farmers Trust Company, of New York, as Executor and Trustee of estates, and on behalf of other estates, for which the undersigned are counsel, wherein the Commissioner of Internal Revenue has determined inter vivos transfers of the decedent to have been made in contemplation of death.

Facts.

The facts are admitted and are relatively simple. They are fully set out in the Record on Appeal and in the brief of counsel for the petitioners. In brief they are as follows:—

Seth M. Milliken died on March 5th, 1920, leaving a large estate. In December of 1916 he transferred by way of gift 2713 shares of stock of Minot Mills (Inc.) to his two sons and daughter. The petitioners have waived any right to say that such gifts did not constitute transfers in contemplation of death.

Brief Resume of Facts in Two of the Cases Represented by the Undersigned.

In one of these cases the property transferred was transferred during the period of the operation of the Act under which the decedent died, and the value of the property transferred was substantially the value thereof as of the date of death, and also the donee was possessed of relatively the same property that was transferred by the donor. But in this case there were not sufficient assets in the estate of the decedent to pay the tax assessed by reason of the irrevocable *inter vivos* gifts.

In the other case the facts briefly are the following: In February and March, 1924, a donor transferred by way of gift property having a value of approximately $389,000.00 to her daughter. The donor died in November of 1927. In November, 1927, the specific securities transferred in 1924 had a value as determined by the Commissioner of Internal Revenue of approximately $505,000.00. Some of the securities transferred by the donor in 1924 had been disposed of by the donee prior to the death of the donor in November, 1927. Never-

theless the Commissioner of Internal Revenue taxed the value of the securities transferred at the value thereof at the date of the death of the donor.

The Issues.

This brief will deal only with the constitutionality of the provisions of the Federal Estate Tax Act in so far as they attempt to impose a tax upon gifts irrevocably made, even though made in contemplation of death. The constitutionality of the law will be approached from the consideration of two major propositions: (1) May a transfer made during the pendency of one tax law with stated graduated rates of tax be taxed as an excise under a subsequently enacted tax law at greatly increased graduated rates of tax?; and (2) may an irrevocable *inter vivos* transfer, even though in contemplation of death, be subject to the Federal estate tax as a part of the estate of the decedent, and the tax rate applied upon the value of the property transferred at the value thereof upon the date of the death of the donor, and in addition thereto, the graduated tax rate applied to the value of such property added to the value of property composing a part of the estate of the decedent?

POINT I.

May a transfer made during the pendency of the tax law with stated graduated rates of tax be subject to an excise tax under a subsequently enacted law at greatly increased graduated rates of tax?

Counsel for the petitioners have quite adequately discussed the issue of whether the statute (Revenue Act of September 8, 1916) existing at the time of the gift was repealed by the Revenue Act of 1918 (in existence at

the time the donor died), under which latter act the tax was asserted and collected. We therefore shall confine the argument presented herein to the issue of whether under the Federal Constitution (Art. 1, Sec. 2, Cl. 3, Sec. 9, Cl. 4, and the Fifth Amendment) the rate or amount of the excise may be increased after the full completion of the occasion giving rise to the tax.

If a transfer even though intended to take effect in possession or enjoyment at or after death may not be subjected to tax under a statute enacted after the transfer (*Nichols* v. *Coolidge*, 274 U. S. 531; *Frew* v. *Bowers*, 12 Fed. [2d] 625, C. C. A. 2nd), and a gift made during the pendency in Congress of a law imposing a tax upon such gifts constitutionally may not be amenable to such tax when the law is enacted (*Untermyer* v. *Anderson*, 276 U. S. 440), it should follow necessarily that a transfer already complete may not be subjected to an increased rate of tax under a subsequently enacted law.

The New York courts have held that an irrevocable transfer is immune from encroachment by subsequent legislation (*Matter of Pell*, 171 N. Y. 48; *Matter of Craig*, 97 App. Div. 289, affd. 181 N. Y. 551; *Matter of Lansing*, 182 N. Y. 238; *Matter of Barstow*, 230 App. Div. 371, October, 1930).

In the *Barstow* case the transfer in trust was subject to tax as a transfer intended to take effect in possession or enjoyment at or after death under the law existing in 1923 in which year the transfer was made, but before the death of the transferror in 1926 the law was amended so as to impose a greater tax burden, and the Court held the transfer subject to tax only at the rates and under the law obtaining at the time of the transfer by the indenture of trust.

In Pennsylvania (*Houston Estate*, 276 Pa. St. 330) it has been held that an increase in the death duty rate from five per centum to ten per centum after a transfer

intended to take effect in possession or enjoyment at or after death has been made but before the death of the transferror, is invalid, and that the transfer is taxable only at the rate in existence at the time it is made. (See also *Matter of Schmidlapp*, 236 N. Y. 278.)

When the gift or transfer is complete and fully vested, and the transfer "has passed beyond dependence upon the continuance of the state's permission or grant" cases such as *Saltonstall* v. *Saltonstall*, 276 U. S. 260, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (as to two trusts), *Patton* v. *Brady*, 184 U. S. 608, and *Stockdale* v. *Insurance Companies*, 20 Wall. 323, have no pertinent application.

Here we are dealing with an excise upon a single act already complete at the time of the enactment of the law under which it is sought to be taxed. We are not dealing with an incomplete transfer such as existed in the *Saltonstall* and *Northern Trust Company* cases, nor with an increased excise tax during the period of the excisable occasion, as in the *Patton* case, nor with limited retroactive legislation in respect of a direct or property tax (income tax), as in the *Stockdale* case or in *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1, but with a transfer of property irrevocably and completely made and fully vested prior to the enactment of the law under which the tax was sought to be imposed. We are dealing with a law that has placed an additional burden upon a transaction differently burdened, if at all, at the time it took place.

At the time of the gift, assuming the gift was subject to the tax, the law imposed a tax at the maximum rate of ten per centum. At the time of the death of the donor more than three years afterwards, the law then in existence imposed a tax upon the same transfer at a maximum rate of twenty-five per centum, and the graduated rate is made applicable not only to the value of the property transferred but the value thereof added to the value

of the property belonging to the donor at death. In the language of Judge Learned Hand in *Frew* v. *Bowers* (12 Fed. [2d] 625, 630) "Such a law is far more capricious than merely retroactive taxes".

Such a law, or such an application of the law, is as deserving of the condemnation of the Court, as capricious and unreasonable, as was the gift tax in *Untermyer* v. *Anderson*, supra, or the estate tax in *Shwab* v. *Doyle*, 258 U. S. 529, and *Nichols* v. *Coolidge*, 274 U. S. 531. The tax in suit is upon a gift. True, it is called a tax upon a gift in contemplation of death. But the gift is none the less a gift, and none the less irrevocable. The property given is not a part of the estate of the decedent at the time he died. The property is not transferred by virtue of death nor at death. That is, death does not mark the time of the transfer, nor is a gift so made testamentary in any sense of the word. The property transferred had belonged to others for a period of more than three years prior to the death of the donor, and may have been transmuted into other property of a greater or lesser or of no value at the time of the death of the grantor.

"The rate of taxation is an indispensable element in the assessment, as much so as the value on which it is to be laid. Without either no assessment can be made." (*Page* v. *Skinner*, 298 Fed. 731, at p. 735, certiorari denied 266 U. S. 625).

If the transfer be wholly free of tax at the time thereof the decisions of this Court are clear that it remains immune from subsequent legislative attack. (*Nichols* v. *Coolidge*, supra, *Untermyer* v. *Anderson*, supra; cf. *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338).

An increase in the rate of tax upon a transaction already complete at the time of the increase (even though the increase be by amendment of the law rather than by a new enactment) is no less capricious and whimsical. A transfer complete at the time of the adoption of a law

imposing a tax upon such transactions for the first time can be no greater a violation of the Fifth Amendment of the Constitution of the United States than a subsequent increase of the tax burden. The amount of the burden is as unforeseen in one instance as in the other. (Cf. *Nichols* v. *Coolidge*, supra; *Untermyer* v. *Anderson*, supra; *Frew* v. *Bowers*, supra). But as this is a death duty subjecting to tax the transfer only when death occurs the transfer may not be taxed at the old rates because they no longer exist as a part of the law, when the tax accrues.

If the deed be done, the act complete, the transfer irrevocable and the interest of the donees vested absolutely, at the time the tax burden is laid or increased, there would be no choice or election left whereby the tax could be escaped. It would be in effect nothing more nor less than an "absolute and unavoidable demand", and thus within the implications of the pronouncements of this Court an unapportioned direct tax in violation of Art. 1, Sec. 2, Cl. 3, and Sec. 9, Cl. 4 of the Constitution of the United States. (*Thomas* v. *United States*, 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-152; *Nicol* v. *Ames*, 173 U. S. 509). Such a statute would single out certain past irrevocable gifts for taxation to the exclusion of other past irrevocable gifts.

As "taxes are very real things and statutes imposing them are estimated by practical results" (*Nichols* v. *Coolidge*, supra, at p. 541), the statute here must be construed in the light that it has imposed a burden of a possible twenty-five per centum tax upon a transfer that at the time it was made was subject, if at all, to a tax burden of only a possible maximum of ten per centum. The practical result of the statute as applied herein is the imposition of a retrospective excise.

> " 'Retroactive laws are, indeed, generally unjust; and, as has been forcefully said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

> There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated."

A tax burden retroactively laid upon a completed transaction violates the Federal Constitution. (*Untermyer* v. *Anderson*, 276 U. S. 440). This is true fundamentally whether the excise be by statute for the first time enacted, or by an attempted retrospective increase of the tax burden.

POINT II.

May an irrevocable transfer made in contemplation of death (whether made before or after the passage of the act) be subject to the Federal Estate Tax Act of 1918 (effective February 24th, 1919)?

This inquiry properly may be considered from two standpoints:—

1. A consideration of the Act itself, and the bases of the tax as well as its method of computation;
2. A consideration of the tax as imposed by and applied under said Act with reference to whether it violates the Fifth Amendment of the Constitution.

In this order the constitutionality of the statute in suit as applied will be considered. Any discussion of the unconstitutionality of the law as drawn in its application

to transfers made in contemplation of death, must necessarily be upon the hypothesis that the transfers made in contemplation of death subjected to tax by the statute are not limited to gifts *causa mortis*. (See Art. 23, Regulations 37, promulgated under Rev. Act of 1918). Of course, if the statute applies only to gifts *causa mortis* there could be no issue as to the constitutionality of the application of the law in the point now discussed, for gifts *causa mortis* have always been treated as the equivalent of legacies and as being definitely testamentary in character. Gifts *causa mortis* were considered testamentary as far back as the old Roman law (1). The term "gifts *causa mortis*" was codified in the provisions covering the law of gifts in the "Civil Code of the State of New York" (prepared for adoption in 1865 by David Dudley Field and Alexander W. Bradford but never adopted) and familiarly known as the "Field Code" (2). These provisions, however, have been copied in the Civil Code of California and some other states.

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(1) For the antiquity of gifts *causa mortis* see Institutes of Justinian (Abdy & Walker Edition 1876 at p. 119 et seq. See also "Rome the Law-Giver" (by J. Declareuil, Professor at the University of Toulouse, translation by E. A. Parker), p. 372. "The gift in anticipation of death (*mortis causa*), whether oral or written; required under Justinian the presence of 5 witnesses, but no registration. It was revocable, *ad nutum*, unless the donor had renounced it," etc.

Even at the time of Augustus there was a testamentary succession tax (*vicesima hereditatum*) on the manumission of slaves (Gibbon's Decline and Fall of the Roman Empire, Ch. 6).

(2) The pertinent provisions of the Field Code in respect of gifts *causa mortis* are:

§503. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

§504. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

§505. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

§506. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

§507. A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver."

If the statute applies only to gifts *causa mortis* then the statute is not subject to constitutional objection upon the ground that the property is not transferred at death, nor upon the ground that the property transferred is taxed at its value as of the date of death, nor is it subject to attack upon the ground that property transferred *causa mortis* is not a part of the estate of the decedent which would be "subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate". (§402(a) Revenue Act of 1918; see also *Crooks* v. *Harrelson, et al.*, decided by this Court on December 4th, 1930).

But the statute as applied in the present case does more. It is treated as imposing a tax upon transfers not *causa mortis*, but irrevocably made if made in contemplation of death.

With the understanding, therefore, that we are addressing our argument to gifts not made *causa mortis*, but *inter vivos* and irrevocable, as the gifts in suit were, we shall consider the framework of the statute and its application.

1. A consideration of the Act itself, and the bases of the tax as well as its method of computation.

Section 401, Title IV of the Revenue Act of 1918 provides

> "That • • • a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States."

This is the only imposing section of the law. As this Court, through Mr. Justice Stone, said in *Reinecke* v. *Northern Trust Co., supra*, at p. 348:

"It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, *are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death.* They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment." (Italics ours.)

It will be noted that in all of the instances of Section 402 of the law, except that in respect of contemplation of death, a property right or interest is transferred at death and thus properly may be subjected to tax as a part of the estate of the decedent. At least up to the moment of death there are rights in property over which the decedent retained "control, possession or enjoyment."

Section 401 clearly does not impose a tax upon transfers made in contemplation of death. Section 402 therefore must be invoked in order to bring such transfers within the taxing ambit of the statute. Section 402 does not impose a tax. That section merely provides what property shall constitute the gross estate for the purposes of computing the tax. Section 402 reads in part as follows:—

"§402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real

or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate;

* * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of *this* Act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *"

Subdivision (c) attempts to bring within the gross estate the value of property "to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of * * * death * * *." But the introductory clause of Section 402 does more. It provides that the gross estate shall be determined by including the "value at the time of his death". The statute therefore simply means that if a transfer has been made prior to death the property so transferred shall for the purposes of the tax be valued as of the date of death, and this regardless of the appreciation of the property from the time of the transfer to the date of death. It may be that subdivision (c) fairly is susceptible of the construction that the value to be used is the value as of the date of the transfer if the transfer be irrevocable. But this construction would be inconsistent with the introductory provision of Section 402, and contrary to the manner in which the law is administered (see *Chase National Bank* v. *United States*, 278 U. S. 327, p. 334). On the other hand, subdivisions (a), (b),

(d), (e) in part and (f) of Section 402 in unambiguous terms indicate that the interest in property transferred shall be valued as of the date of death. The language in (b) is specific "to the extent of any interest therein of the surviving spouse, *existing at the time of the decedent's death*, etc." Again, in (d) the language is "to the extent of the interest therein held jointly or as tenants in the entirety by the decedent * * *." If the property be held jointly or by the entirety at the moment of death naturally the values as of the date of death are the appropriate values. (*Tyler* v. *United States*, 281 U. S. 497). The language of subdivision (e) is "to the extent of any property passing under a general power of appointment * * *." In so far as such property would pass under the exercise of a general power of appointment by will, and as the tax is upon the right to exercise the power, the values as of the date of death naturally are the appropriate values. But where the power is exercised by deed "in contemplation of, or intended to take effect in possession or enjoyment at or after death * * *" the propriety of the provision taxing the value of the property so passing under the power as of the date of death instead of as of the date of the actual exercise of the power is as questionable as it is in subdivision (c). Subdivision (f) provides "to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent * * * and to the extent of the excess of $40,000 of the amount *receivable by all other beneficiaries*". Here, again, the value as of the date of death is the appropriate value.

The reasonable inference is that the statute read as a whole is susceptible only of the appropriate construction that the values as of the date of death are the values referred to in Section 402. So read, the statute is unreasonable and capricious when it applies to irrevocable

transfers made *inter vivos*. This is true whether the transfer be intended to take effect in possession or enjoyment at or after death, or be made in contemplation of death. In either case the statute imposes a tax in part upon property values never owned and never transferred by the trustor or donor. As Judge Learned Hand said in *Frew* v. *Bowers* (12 Fed. [2d] 625, at p. 630):—

> "There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes."

Or, as Judge Hough in the same case said at p. 628:—

> "But, if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done; i. e., use the property of A. as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is."

Mr. Justice McReynolds in *Nichols* v. *Coolidge*, 274 U. S. 531, at p. 542, said:—

> "Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing

for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. [2d] 625."

The statute provides that the payment of the tax shall be made by the estate of the decedent. (Secs. 407-408 Rev. Act. 1918).

Section 409 imposes a lien to secure the tax upon the property transferred. It does more however. It imposes a personal liability upon the transferee of a transfer made in contemplation of death or the trustee of a transfer intended to take effect in possession or enjoyment at or after death. The pertinent portions of Section 409 are as follows:—

"If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, *and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall* be PERSONALLY LIABLE FOR SUCH TAX, and such property, to the extent of the decedent's interest therein at the time of such transfer * * * shall be subject to a like lien equal to the amount of such tax. * * * ". (Italics and capitals ours.)

It would follow that in the case of a transfer irrevocably made in contemplation of death, of real property having a value of $50,000 sold by the donee for the sum of $50,000, and subsequently to that sale and before the

death of the donor, so developed by the donee's vendee, either through the discovery of oil or mineral deposit, that at the time of death of the donor it had acquired a value of $1,500,000, and the donor had died leaving an estate of $5,000, the tax would amount to $101,500.00. Obviously the estate could not pay this tax. Then Section 409 would be invoked, and that section provides that if the tax in respect of the transfer in contemplation of death upon the property transferred "is not paid when due" the *transferee shall be personally liable* for such tax. He then would be required to pay a tax (after the assets of the estate of $5,000.00 had been exhausted) of $96,500.00 or $46,500.00 more than was ever transferred by the donor or ever received by the donee. Section 409 is not susceptible of interpretation that the personal liability of the donee is limited to the value of the property received by him, for the provision in respect of the lien is a provision of the law in addition to the personal liability of the transferee.

But may it be said that the decedent has ever transferred, or ever owned in order to transfer, property in excess of the value thereof at the time the transfer was made?

In the illustration given, if the donor had sold the property for $50,000.00, and made a gift of the proceeds of the sale in contemplation of death, the tax would be calculated only on $50,000.00. But if he give the property itself the tax is on $1,500,000.00 or $1,450,000.00 more property or property values than the donor ever transferred or owned. The statute therefore imposes a different tax burden dependent upon whether the gift be money or property. Yet the tax is computed only upon money values and translated only into dollar terms.

The undersigned are counsel in a case now pending in the Board of Tax Appeals wherein the decedent made during her life an absolute gift of securities in February

and March of 1924, of a value of $389,000.25. The donor died in November, 1927, leaving a small estate of $14,059.65. The value of the securities transferred in 1924 (some of which the donee had parted with before the death of the donor) had a value on November 22nd, 1927, as determined by the Commissioner of Internal Revenue, of $505,792.52.

The tax determined by the Commissioner upon the value at death of the specific securities given plus the value of the estate of the decedent (which was only $14,059.65) amounted to $13,221.15. If the value of the property transferred by the donor had been used in the computation of the tax together with the value of the estate the tax would have been only $8551.22. Under the whip of the statute a tax of $4669.93 has been imposed upon the transfer of property never owned by the donor and never transferred by her—and in this instance in part never owned or enjoyed by the donee.

The statute thus applied is patently whimsical and capricious beyond reason.

2. The tax as imposed by and applied under said Act violates the Fifth Amendment of the Constitution.

A progressive graduated excise upon a transfer—whether that transfer be by way of gift or by sale—may be measured only by the value of the thing transferred. As Mr. Justice White said in construing the inheritance tax act of 1898 in *Knowlton* v. *Moore* (178 U. S. 41), at p. 76:—

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on

> which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. *The gross inequalities which must inevitably result from the admission of this theory are readily illustrated.*" [Italics ours.]

In *Nichols* v. *Coolidge* (274 U. S. 531) this Court through Mr. Justice McReynolds points out the arbitrary character of a tax system that imposes a tax upon a transfer measured by anything other than the value of the thing transferred. At p. 542 he says:—

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. *Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died.* See *Frew* v. *Bowers*, 12 Fed. [2d] 625." (Italics ours.)

In *Chase National Bank* v. *United States* (278 U. S. 327) Mr. Justice Stone speaking for this Court said at p. 334:—

> "The statute in terms taxes transfers. Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of *transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death.* Cf. *F. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; *Nichols* v. *Coolidge*, 274 U. S. 531." (Italics ours.)

And again, at p. 336:—

> "But we think that the rule applied in *Saltonstall* v. *Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the *power of disposition is reserved exclusively to the transferor for his own benefit.* Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, *and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.*" [Italics ours.]

It is true that at pp. 338-339 the Court said in holding that the value of the insurance policies which were there subject to change or to being revoked for or to the benefit of the insured decedent, could be included as a part of the gross estate

> "The inclusion in the gross estate of gifts made in contemplation of death under Sec. 402(c) has a like effect".

But there was not before the Court in that case the question of whether an absolute and completed transfer of property prior to death could be taxed as a part of

the estate of the decedent under the form and in the manner provided by the statute in suit. Nor did that case have to do with a transfer of property that passed irrevocably "from the possession, enjoyment or control of the donor" prior to his death. This is indicated in the companion case decided the same day of *Reinecke* v. *Northern Trust Company* (278 U. S. 339). We repeat, in this case the Court said at p. 348:—

> "It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or *property passing out of the control, possession or enjoyment of the decedent at his death.* They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. *The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment.* In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death', *include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401.* That doubt must be resolved in favor of the taxpayer." (Italics ours.)

Continuing, this Court said in *May* v. *Heiner*, (281 U. S. 238) at p. 244:—

> "The statute imposes 'an excise upon the transfer of an estate upon death of the owner'. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61; *Nichols* v. *Coolidge*, 274 U. S. 531, 537."

The Court then quoted in part as pertinent to the issues presented in *May* v. *Heiner*, supra, the quotation above made from the *Reinecke* v. *Northern Trust Company* opinion.

In the case of *Tyler* v. *United States*, (281 U. S. 497) having to do with the taxability of estates held by the entirety, this Court through Mr. Justice Sutherland, at p. 503, said:—

> "The question here, then, is not whether there has been, in the strict sense of the word a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, *but whether the death has brought into being or ripened for the survivor*, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

It will be noted that through all of these cases and through all of the decisions of this Court, the basis of the tax is the transfer at death of a property right or interest over which the transferror up to the moment of his death had the beneficial "possession, enjoyment or control."

There must be at the moment of death a transfer of property the control of which transfer rested beneficially in the grantor. If there be no property transferred at death, there can be no tax.

> "The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate." *Knowlton* v. *Moore*, supra, at p. 59.

Again

> "Of course, they concern the passing of property by death, *for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed.*" (ib. p. 78.) (Italics ours.)

This thought is reflected in the opinion in *Nichols* v. *Coolidge*, supra, wherein the Court said at p. 542:—

> "If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died."

But this has to do not with "the power of taxation granted to Congress * * * but to an abuse of it." (*Tyler* v. *United States*, supra, at p. 504). True, "the power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." But we submit that the imperious and fundamental necessity of government does not on the other hand permit the Congress to impose a tax otherwise in violation of the Constitution, *upon the fiction* that property transferred in contemplation of death is in fact transferred at death, unless such a transfer be in truth at death as in the case of a *donatio causa mortis*.

A tax may not be called one in contemplation of death unless it is in fact in contemplation of death, and this regardless of the legislative intent and assumption that such a tax is necessary in order to prevent evasions

of the general scheme of death taxes. (See *Schlesinger v. Wisconsin*, 270 U. S. 230). In this case the Court said in respect of the Wisconsin statute which provided that all gifts made within six years of death should be presumed to have been made in contemplation of death, at p. 240:—

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasions of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the state more readily to collect lawful charges against 'B'. *Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity.* The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

See also *State Tax Commission v. Robinson's Excr.* (Ky.) 28 S. W. [2d] 491, in which a law making taxable all gifts made within three years as gifts made in contemplation of death was held unconstitutional.

It is of the essence of fiction to say that a gift, merely because made in contemplation of death, constitutes a transfer of property at death. If that need illustration it can be found in the case at bar, where the gift was made more than three years prior to the death of the grantor; or, in the case hereinbefore referred to which the undersigned represent where the gift was made more than three years and eight months prior to the death of the donor, and in which latter case the income and usufruct of the property so transferred, including possible capital gains upon the sale thereof, had by assessment against the donee paid its appropriate income tax into the United States Treasury. To say that Seth Milliken, the de-

cedent, transferred the property made the subject of this suit at his death, or transferred an interest therein susceptible of valuation as of the date of his death, "is to say something which is simply not true". (District Judge Morton in *Nichols* v. *Bradley*, 13 Fed. [2d] 857, at 859—affirmed by Circuit Court of Appeals, 27 Fed. [2d] 47.) In this case the District Judge said:—

> "To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true."

The taxing power of Congress is plenary except in respect of exports, a tax upon which is specifically prohibited. So much may be admitted without in any way affecting or militating against the force of the challenge to the provisions of the statute in suit. The use of this plenary power, however, must be in accord with the provisions of the fundamental law (the Constitution), the ordaining of which gave birth at once to the power. If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and its entirety. (*Fairbank* v. *United States*, 181 U. S. 283). Admittedly a tax may be imposed upon property or upon persons, but the tax must be apportioned. (*Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601; *Eisner* v. *Macomber*, 252 U. S. 189). Admittedly a tax may be imposed upon the sale of produce upon a board of trade or an exchange (*Nicol* v. *Ames*, 173 U. S. 509), upon the sale of shares of stock (*Thomas* v. *United States*, 192 U. S. 363, 370), upon the use of foreign built yachts (*Billings* v. *United States*, 232 U. S. 261), upon manufactured to-

bacco held for sale (*Patton* v. *Brady*, 184 U. S. 608), and upon the manufacture and sale of coloured oleomargarine (*McCray* v. *United States*, 195 U. S. 27). Admittedly, now, (*Bromley* v. *McCaughn*, 280 U. S. 124) a graduated excise may be imposed upon gifts.

But these taxes are all imposed not only within the admitted power of the Congress, but within the restrictions and regulatory provisions of the Constitution. It does not follow that a graduated excise may be imposed upon a sale of produce upon a board of trade, or upon shares of stocks, or upon gifts, the measure of the tax to be the value of the property at some uncertain date, one, three or ten years subsequently.

We venture to believe that if the gift tax upheld in *Bromley* v. *McCaughn*, supra, as a constitutional exercise of the taxing power within the limitations and prohibitions prescribed, had been imposed upon the value of all gifts made (whether of property or of money), the tax to be computed upon the value of the property three years from the date of the gift, for one donor, two years for another, four months for another, four days, and so on, or the value of the property even as of the last day of the year, that the statute would have been held arbitrary, unreasonable and capricious, and as such in violation of the Fifth Amendment.

The Congress may not any more than a State undertake to do indirectly what the Constitution forbids it doing directly, or do indirectly what it has no right to do directly. (*Child Labor Tax Case*, 259 U. S. 20; *Trusler* v. *Crooks*, 269 U. S. 475; *Hill* v. *Wallace*, 259 U. S. 44; *Fairbank* v. *United States*, 181 U. S. 283).

The Fifth Amendment stands guard against congressional usurpation or arbitrary and capricious exactions by the Federal Government as fully and effectively as the Fourteenth Amendment does in respect of exactions by

the States "without due process of law". In *Carroll* v. *Greenwich Ins. Co.* (199 U. S. 401) Mr. Justice Holmes states the converse of this now conceded principle of government at p. 410 as follows:

> "* * * if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."

The Congress, under the guise of a tax may not undertake to regulate the employment of child labor (*Child Labor Tax Case*, 259 U. S. 20), or the grain exchanges (*Hill* v. *Wallace*, supra, *Trusler* v. *Crooks*, supra).

> "The power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed." (*Evans* v. *Gore*, 253 U. S. 245 at p. 256—and see cases there cited).

But said this Court through Mr. Chief Justice Taft in *Barclay & Co.* v. *Edwards* (267 U. S. 442, at p. 450 [in quoting the above]):—

> "The power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is *reasonable, and not merely arbitrary and capricious, the Fifth Amendment cannot apply.*"

The rule then is not so stark as the statement of the plenary powers of Congress to tax would imply. The power exists,—but it must be exercised in the manner and form provided for in the Constitution. (*Pollock* v. *Farm-*

ers' Loan & Trust Co., supra). This is necessary to the preservation of government itself. If the government may act outside of constitutional limitations, the citizen will demand the same freedom from lawful restraint. If the power be not there as in a tax upon exports, they may not be taxed indirectly (*Fairbank* v. *United States*, supra), nor the emoluments of constitutional officers be diminished indirectly by subjecting the compensation to income taxes. (*Evans* v. *Gore*, supra). Even when the power to tax exists it may not be arbitrarily and capriciously exercised. (*Nichols* v. *Coolidge*, supra; *Untermyer* v. *Anderson*, supra; *Frew* v. *Bowers*, 12 Fed. [2d] 625, C. C. A. 2nd). The courts were ordained under our constitutional system to protect the citizen from arbitrary and unreasonable action by the Congress as well as "to preserve the integrity of the powers of the Government". (Wilson's Constitutional Government in the United States, pp. 17, 142—quoted in *Evans* v. *Gore*, supra, at pp. 2521-2522).

While the courts may be loath to declare unconstitutional acts of Congress (*Knowlton* v. *Moore*, 178 U. S. 41), they are no less loath to validate arbitrary and capricious exactions from the citizens merely because called "taxes", and merely because done in the name of "revenue". "Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity". (*Schlesinger* v. *Wisconsin*, supra, at p. 240).

The tax on the transfer of the estate of the decedent herein is measured by the value of property given away more than three years before his death, and the tax is computed on the value that this property so given had three years after the donor had ceased to own it. The tax is so imposed whether or no the donee still possessed the property; the tax is so imposed regardless of the value of the property left by the decedent at his death,

and transferred by his death. The statute takes no account of the value of the thing transferred, or the value of the interests of the donor transferred, and counts not the tax cost to the estate of the decedent upon property values never owned by the decedent. It ignores the fluctuations in the values of securities, or the possible enormous increase in the value of real estate. The tax burdens attach regardless of who suffers and regardless of whether the values taxed ever belonged to the donor or donee. The tax follows not the values transferred but the property, and finding that in whosesoever hands revenue is exacted upon the value thereof as of the time of death of the donor from the donor's estate or the donee.

A tax so imposed, so computed, is determined truly by "the sport of fortune". It may just as well, as Judge Learned Hand said in *Frew* v. *Bowers,* supra, be fixed by the price of wheat or doubled because the decedent died on Wednesday.

But it is argued all who make irrevocable transfers in contemplation of death run the same risks and are taxed the same way. But this is an indictment of the statute, not a defense of it. The fact would remain that the statute would arbitrarily and capriciously discriminate between a donor making an irrevocable transfer *inter vivos* in contemplation of death, and a donor making an irrevocable transfer *inter vivos* not in contemplation of death, taxing the one and not the other.

Moreover, because the estate of every man who dies may with the favourable or unfavourable fortuities of chance be taxed differently, depending upon the date he dies, and the subsequent economic appreciation or depreciation of the article transferred many years prior to death, does not render the tax any the less capricious. If anything the thoroughgoing nature of the statute makes the act all the more blameworthy.

But the argument runs that estate taxes could and would be avoided, and that the provisions of Section 402 (c) must be sustained as a valid imposition even though if standing alone of doubtful constitutionality they be a part of the general scheme of taxation deemed necessary to prevent tax avoidance. We respectfully submit that a tax imposed upon "A" which would be otherwise unconstitutional cannot be made constitutional because of the danger that "B" might avoid a similar tax. (*Schlesinger* v. *Wisconsin,* supra, at p. 240). We think this Court should be slow to place its stamp of approval upon a method of taxation that is in its operation and application patently capricious and unjust.

If a given transfer fall within the statute it is unnecessary to establish an intent to "evade" the tax in order to make it taxable; if it does not, an intent to "evade" is immaterial. (See *Bullen* v. *Wisconsin,* 240 U. S. 625, at p. 630). In this case Mr. Justice Holmes expressed the thought as follows:—

> "* * * when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

The desire to prevent evasion of death duties may permit the legislature to tax certain transfers, but when the legislative policy is effectuated by a statute which describes the transfers to be taxed, the "evasion" question is superseded by the statute designed to prevent evasion, and the only matter to be determined is whether or not a particular transfer was made under circumstances which bring it within the class made taxable by the statute.

It is possible, of course, that proof of an intent to "evade" may bear upon the issue as to whether or not a transfer has been made under taxable circumstances, but the presence or absence of such an intent is not the standard by which taxability or nontaxability is to be determined.

The provision of the statute taxing gifts in contemplation of death was borrowed from the state statutes and presumably from the New York statute, as New York was the first of the states to impose a tax upon gifts made in contemplation of death. But the scheme of the New York tax and of the other state taxes is different from that of the Federal tax. Under the state law the tax is upon the transfer as of the date of the transfer and the property so transferred in contemplation of death is taxed separately from the property passing at death, because property irrevocably transferred, though in contemplation of death, is not transferred at death and is not a part of the estate of the decedent (*Matter of Hodges*, 215 N. Y. 447, 449; *Matter of Webbe*, 151 App. Div. [N. Y.] 539, 541). This is likewise the rule in California, which was the second of the states to impose a tax upon transfers in contemplation of death. (*Chambers* v. *Lamb*, 186 Cal. 261, 264, 265).

The Federal Estate Tax Act does not permit the irrevocable transfer made *inter vivos* to be taxed separately from the property constituting the estate of the decedent and passing at his death. Nor does the statute permit of a valuation of the property as of the date of the transfer. The Federal statute with reference to gifts made in contemplation of death has undertaken to set up a basis for taxing *inter vivos* transfers incompatible with justice, and with necessarily capricious and unreasonable results. Section 401 imposes a tax on the net estate of the decedent. Section 402 defines the gross estate and the basis of arriving at the value thereof for

the purposes of computing the tax. It provides that the tax shall be computed on the value as of the date of death of those items which it undertakes to cast into the gross estate. The Federal statute in addition imposes a graduated rate of tax on the total.

It may not be urged that this Court in sustaining the constitutionality of the gift tax under the Revenue Act of 1924 in *Bromley* v. *McCaughn* and upholding the propriety of computing the tax on the value of all the transfers made by the donor during the year is authority for upholding the tax here involved. That was an annual tax, based upon the value of gifts made during the period of the taxable year. Also in the gift tax the liability was all upon the donor. The adding together of the gifts was for the purpose of measuring the annual tax. It warned the taxpayer that if gifts over $50,000 were made in any particular calendar year the donor was liable for a graduated tax computed upon the value of the gifts as of the time made. The donor at the time of each gift could calculate his tax liability, and would know his tax burden. Here, no annual tax is imposed, no definite period is fixed for the accumulation of the value of the gifts for the purposes of the computation of the tax, and gifts made one, three, five or twenty years before death are all combined with the value of the property left at death for the purpose of calculating the tax, if the gifts be made in contemplation of death. Also the values of the gifts are ignored, and the property is given a value as of the date of the subsequent death of the transferror for the purposes of reckoning the excise. The gift and the values taxed have no relation to each other.

In the statute in suit a liability is placed upon the transferror or his estate for the payment of a tax upon the value of property never transferred by him, and in many instances never received by the transferee, and if his estate be unable to pay the tax the transferee or

donee regardless of what he has received is made by virtue of Section 409 personally liable for a tax, not upon what was given to him, but upon property that has enhanced in value in his hands, or as not infrequently occurs, in the hands of his vendee or alienee.

The inability to apply the statute constitutionally to a tax upon gifts in contemplation of death or any other irrevocable *inter vivos* transfers leaving in the grantor no property right or interest is inherent in the statute itself. The state statutes in imposing a tax upon transfers in contemplation of death tax the transfers. The impact of the tax does not wait upon death. The transfer of the property creates the obligation. The statute in suit is not susceptible of this construction.

Clearly a gift in contemplation of death is not testamentary. In fact the exact contrary is true. Irrevocability excludes the hypothesis that such a transfer is of a testamentary nature, that is, is in any way ambulatory. The two terms in fact, unless the gift be one *causa mortis*, are antithetical and repellant to each other.

We submit therefore that in order to harmonize the scheme of the Federal estate tax law as enacted by the Congress with the Constitution and with the other items constituting the gross estate as provided for in Sec. 402, transfers in contemplation of death may be included as a part of the gross estate only if they be transfers *causa mortis*, and those transfers within the doctrine and principle laid down by this Court in *Chase National Bank* v. *United States, supra, and Reinecke* v. *Northern Trust Company, supra,* and *May* v. *Heiner, supra.*

Other transfers defined in Section 402(c) are not taxable—if irrevocable from the time thereof.

This Court has held that an irrevocable transfer not in contemplation of death but with the reservation of the income is not one intended to take effect in possession or

enjoyment at or after death under Section 402(c) of the Revenue Act of 1918. The Court said in *May* v. *Heiner,* supra, at p. 243:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. *But this is not of special importance since the refund should have been allowed in either event.*
>
> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

True, the provisions of the trust instrument in *May* v. *Heiner, supra,* were that the property was to be held and the income payable to the husband of Mrs. May during his life and upon his death the income to be payable to her during her life and upon the death of the survivor the remainders over. But as this Court said it "is not of special importance" whether she survived her husband or not, and therefore received the income during her life. Since this decision the lower courts have construed *May* v. *Heiner, supra,* to hold, and pursuant to that construction have held, in several cases, that an irrevocable transfer is not one intended to take effect in possession or enjoyment at or after death within the purview of the Federal statute merely because the grantor has reserved the income during his life. See *Commissioner* v. *Northern Trust Company,* 41 Fed. [2d] 732, C. C. A. 7th Circuit; *Hodgkins* v. *Commissioner,* C. C. A. 7th, decided October 16th, 1930, 44 Fed. [2d] 43; *McCaughn* v. *Carnill,* 43 Fed. [2d] 69, C. C. A. 3rd;

Ullman v. *Commissioner*, 20 B. T. A. 782; *Wheeler* v. *Commissioner*, 20 B. T. A. 695; *Hilton* v. *Commissioner*, 21 B. T. A. 3. See contra *Morsman* v. *Commissioner*, 8th Circuit November 1930, Commerce Clearing House Vol. III, page 9228. Likewise under the Federal statute it has been held that an irrevocable transfer is not subject to tax notwithstanding the transferror reserved the right to change the beneficiary of the trust, excluding himself always as a beneficiary (*Brady* v. *Ham*, C. C. A. 1st, decided November 26, 1930, not yet reported); also a transfer subject to revocation with the consent of a trustee is not taxable if the transfer be otherwise wholly irrevocable. *Hill* v. *Nichols*, 18 Fed. [2d] 139; *Farmers Loan and Trust Company* v. *Bowers*, 29 Fed. [2d] 14, C. C. A. 2nd Cir.; *Erskine* v. *White*, 43 Fed. [2d] 765 (Mass: D. C.). Insurance policies irrevocably transferred are not subject to the tax (Reg. 70, Art. 27, as amended by T. D. 4296).

The state courts have held that transfers subject to the reservation of the income to the grantor are under the state death duty laws transfers intended to take effect in possession or enjoyment at or after death and therefore taxable. This Court has taken the contrary position in respect of the Federal estate tax, and necessarily under the provisions of Sections 401 and 402 of the law were compelled to take the converse position, because the Federal law is an estate tax imposed upon the transfer of an estate by the decedent at death. If the transfer be not at death, that is, there be no shifting of the economic benefits of the thing taxed under the law at or by virtue of death, the statute has no application to the transaction. The Federal statute takes no account of who receives the income because the value of a life estate is not one of the bases of the tax. The tax falls upon the value of the corpus or property transferred, and if that property be transferred not at death but prior thereto, the statute is inapplicable. This is as true nec-

essarily of gifts made in contemplation of death if irrevocable and complete, as it is of transfers in trust upon the reservation of the income therefrom to the grantor during life. In either case the transfer of the thing, the value of which is taxed, is complete, and nothing of taxable property interest passes at death. No control, possession or enjoyment of property given *inter vivos* in contemplation of death ceases or is transferred at or by death. Death is not the "generating source" of either of such gifts. The tax is upon the transfer.

That the tax is upon the transfer and not upon the taking effect in possession or enjoyment at or after death necessarily follows from the decision of this Court in *Nichols* v. *Coolidge, supra,* because the transfer did not take effect in the ultimate remaindermen therein until after the act went into effect. The same thing is true of the decision in *May* v. *Heiner, supra.* The thing upon which the tax rests is the transfer at death.

The bases of valuation negative the intention of Congress to tax anything else, and the capricious character of the tax, if it be applicable to any transfer of property other than such as those over which the decedent, up to the moment of his death, retained "control, possession and enjoyment", marks plainly the invalidity of the statute. A tax system that rests upon problematical and uncertain future or subsequent values of the things or transactions made amenable to the tax is too indefinite, too uncertain, too clearly a matter of chance, too whimsical and arbitrary, to stand the test of reasonableness. The Fifth Amendment is a guard against a tax upon "A", based upon the value of "B's" property; it will not countenance a stamp tax upon the sale of shares of stock the amount of the stamps to depend upon the value of the stock at some uncertain date one, two or twenty years in the future; it would be violated if the tax (tariff) rested upon the value of imports years subsequently to

the time of importation and regardless of whether the importer had disposed of, and the ultimate purchaser had consumed, the thing the import of which had been made subject to tax. That this is so is self-evident.

Is the statute as applied in the case in suit any less arbitrary or capricious; any less lacking in reasonable classification? Is the purpose to prevent evasion of the Federal death duty bound by no restrictions and the Congress free arbitrarily to single out for taxation certain gifts or transfers to the exclusion of others upon the ground that such transfers are reasonably related to other transfers, and capriciously fix the amount of the tax upon the chance value of the thing transferred at some uncertain and unascertained date in the future depending upon when the transferror died? "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." (*Schlesinger* v. *Wisconsin,* supra, p. 240.)

The Fourteenth Amendment is no greater prohibition against the right of a state to deny due process of law than is the Fifth Amendment against the right of the Federal Government to deny due process of law, or to exact arbitrarily the property of its citizens even at the imperious call of the need of revenue.

Conclusion.

We suggest that the tax as imposed in the case in suit is a violation of the Constitution of the United States, in that it constitutes a retroactive excise upon a completed transfer, and thus is in violation of the Fifth Amendment within the decisions of this Court in *Untermyer* v. *Anderson,* supra, and *Nichols* v. *Coolidge,* supra. So retro-

actively applied it is, looking at the substance and not the mere form, an unapportioned direct tax and as such in violation of Article 1, Section 2, Clause 3, and Section 9, Clause 4 of the Constitution.

Even prospectively applied, we submit, the statute as drawn and as applied to irrevocable completed transfers before death is necessarily arbitrary and capricious, and as such is an abuse of the taxing power conferred upon Congress. The exactions under the statute are unjust to the citizen. The statute willfully and designedly imposes a tax upon property values never transferred and frequently never owned by the transferee. It whimsically places tax burdens upon estates because of some prior act of the decedent, and measures the tax by no definite or known standard, and even more capriciously exacts from a transferee a tax in excess of the value of any property at any time transferred by the donor or received by the donee, all in violation of the Fifth Amendment of the Constitution.

POINT III.

The judgment of the Court of Claims should be reversed.

Respectfully submitted,

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 87.—October Term, 1930.

Seth M. Milliken, Gerrish H. Milliken, and Harold A. Hatch, Executors of the Estate of Seth M. Milliken, deceased, Petitioners,
vs.
United States.

On Writ of Certiorari to the Court of Claims.

[March 2, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, 282 U. S. —, October 13, 1930, to review a judgment of the Court of Claims denying to petitioners recovery of a tax alleged to have been illegally exacted under the decedents' estates provisions of the Revenue Act of 1918. 38 F. (2d) 381; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, 1149, 1150.

In December, 1916, while the Revenue Act of that year was in force (Act of Sept. 8, 1916, c. 463, 39 Stat. 756, 777), petitioners' decedent gave to his children certain shares of corporate stock. The donor died March 5, 1920, after the effective date of the 1918 Act. The Commissioner included the shares of stock in the decedent's estate as a gift made in contemplation of death, § 402 (c) of the 1918 Act, and assessed and collected the tax now in suit, which was computed on the basis of the value of the stock at the time of decedent's death, and at the rates in the 1918 Act, which were higher than those fixed by the corresponding provisions of the Act of 1916.

Section 401 of the 1918 Act imposed taxes at specified rates upon transfers of estates by decedents. Under § 403, the taxable estate was the "gross estate" less enumerated deductions. Section 402 provided for the inclusion in the gross estate of the value of property. "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended

to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) . . .". The Act of 1916, §§ 201, 202 (b), which had contained similar provisions for the taxing of decedents' estates, including gifts in contemplation of death, but at lower rates, was repealed, with provisos not now material, by § 1400 of the 1918 Act.

The finding of the Commissioner that the present gift was in contemplation of death is not questioned by petitioners, and is controlling here since it is not challenged by any facts appearing of record. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. —, decided January 5, 1931. Although antedating the enactment of § 402, the gift is embraced within its provisions, which are in terms applicable to gifts in contemplation of death made before the passage of the Act.

Petitioners' argument that § 402 does not apply is not supported by their citations of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, and *May* v. *Heiner,* 281 U. S. 238. In those cases the gifts *inter vivos* were not "in contemplation of death", and the only relevant question was one of construction, whether some of them were of the class intended by Congress to be taxable under § 402 (c) as transfers "intended to take effect in possession or enjoyment at or after death". It was held that they were not. But those gifts were not of the class now involved, gifts in contemplation of death, made before the passage of the Act, which are expressly named by § 402 (c) as subject to its provisions.

This Court has not passed directly on the constitutionality of the federal taxation of gifts made in contemplation of death. But taxation of transfers at death has been upheld, *Knowlton* v. *Moore,* 178 U. S. 41, as has, more recently, the taxation of gifts *inter vivos, Bromley* v. *McCaughn,* 280 U. S. 124; and we hold, as this Court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to secure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation. See *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Tyler* v. *United States,* 281 U. S. 497, 505; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Taft* v. *Bowers,* 278 U. S. 470, 482; cf. *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 239.

The objection to the tax, chiefly urged in brief and argument, is that the taxing statute, as applied, is a denial of due process of law because retroactive. It is said that the statute is invalid not alone because it reaches a gift made before its enactment, but because it measures the tax by rates not in force when the gift was made, applied to the value of the property not when given, but at the uncertain later time of the death of the donor.

This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause. *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. —, decided Feb. 24, 1931.[1] In *Nichols* v. *Coolidge* it was held that § 402 of the 1918 Act could not constitutionally be applied to a gift *inter vivos,* not in contemplation of death, and made long before the adoption of any congressional legislation imposing an estate tax or taxing gifts to take effect in possession or enjoyment at or after death. In *Untermyer* v. *Anderson, supra,* it was held that the retroactive provision of the novel gift tax of the Revenue Act of 1924 was invalid as applied to gifts antedating the Act. In both the point was stressed, as the basis of decision, that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax. See *Nichols* v. *Coolidge, supra,* p. 542; *Untermyer* v. *Anderson, supra,* p. 445. Upon similar grounds, in *Coolidge* v. *Long, supra,* a state tax on successions was held invalid as applied to the gift to the donor's children involved in *Nichols* v. *Coolidge, supra,* because deemed to be a tax on a succession to a gift completely vested before the enactment of the taxing act or of any other law taxing successions by lineal descendents of the donor.

But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court. See *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95

[1] In Blodgett *v.* Holden, 275 U. S. 142, four of the justices thought the taxing statute inapplicable; and four that it applied, but was unconstitutional because retroactive.

U. S. 78, 80; *Railroad Co.* v. *United States*, 101 U. S. 543, 549; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Billings* v. *United States*, 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Hecht* v. *Malley*, 265 U. S. 144, 164; *Cooper* v. *United States*, 280 U. S 409. See *Taft* v. *Bowers, supra; United States* v. *Heinszen*, 206 U. S. 370; *Graham* v. *Goodcell*, 282 U. S. —, decided January 26, 1931.

Hence, in challenging the present tax it does not suffice to say that the gift antedated the statute. It is necessary to consider the nature of the tax and of the decedent's gift. When the gift was made it was subject to the provisions of the 1916 Revenue Act. By it, Congress had adopted the well understood system of taxation of transfers of property at death, already in force in forty-two states. Report No. 793, Senate Committee on Finance; Report No. 922, House Committee on Ways and Means; both on H. R. No. 16763, Sixty-fourth Congress. A characteristic feature of the system was that incorporated in §§ 202 (b) of the 1916 Act and 402 (c) of the 1918 Act, both of which imposed a tax on gifts made in contemplation of death, computed at the same value and rate as though the property given had been a part of the donor's estate passing at death.[2]

While we need not attempt at this time to define with precision gifts in contemplation of death, their characteristic features have been sufficiently indicated by the various treasury regulations dealing with the subject. Regulation 37 under the 1918 Act (Revised ~~Feb. 24~~ Aug. 8, 1919) is typical. It provides (Art. 23): "The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from

[2] In 1916, twenty-nine states and one territory imposed taxes on gifts in contemplation of death at the same rate as on estates passing at death. They were Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, Wyoming, and Hawaii. Most of these provided for appraisal of the value of the property as of the date of decedent's death; but a few (Indiana, Kansas, and Wisconsin) provided for valuation as of the date of transfer. The statutes are collected in Gleason and Otis, Inheritance Taxation (1st ed.).

bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty."

It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death. Decedent's gift as a substitute for a testamentary disposition was thus brought within the operation of the 1916 Act taxing such gifts on the same basis, with respect to rate and valuation, as transfers of property at death. Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them.

The reasonableness of the present application of the increased rate of tax of the 1918 Act must be determined in the light of the legislative policy which the 1916 Act had established before the gift was made. Obviously that policy would be set at naught if gifts made in contemplation of death, after the 1916 Act, were to be taxed more favorably than transfers from the donor occurring at and by reason of his death. As was apparent when the 1916 Act was adopted, that policy could be made effective only if gifts made in contemplation of death, while that Act was in force, were to be subject at the donor's death to such rate as might at the time of that event be applicable to the transfer of the donor's estate. The decedent, when he made his gift, was as well warned that it might be taxed on that basis as he was that it would be so taxed if on that day he had made the same disposition of it by will. A change in the rate applicable to transfers at death necessitates a corresponding change in the rate applicable to gifts made in con-

templation of death, else the purpose in taxing the latter would not be attained. That purpose, as already indicated, was to put such gifts on the same plane as testamentary disposals.

Only a word need be said of the suggestion that the application of § 402 (c) to gifts made while the 1916 Act was in force destroys the character of the tax as one on privileges, and so renders it invalid as an unapportioned direct tax forbidden by §§ 2 and 9 of Article I of the Constitution. See *Levy* v. *Wardell,* 258 U. S. 542, 545. The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character. See *Hecht* v. *Malley, supra,* p. 164. Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death. See *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Lambert* v. *Yellowley,* 272 U. S. 581.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.